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**The North Carolina State Bar**

**Winter 1995**

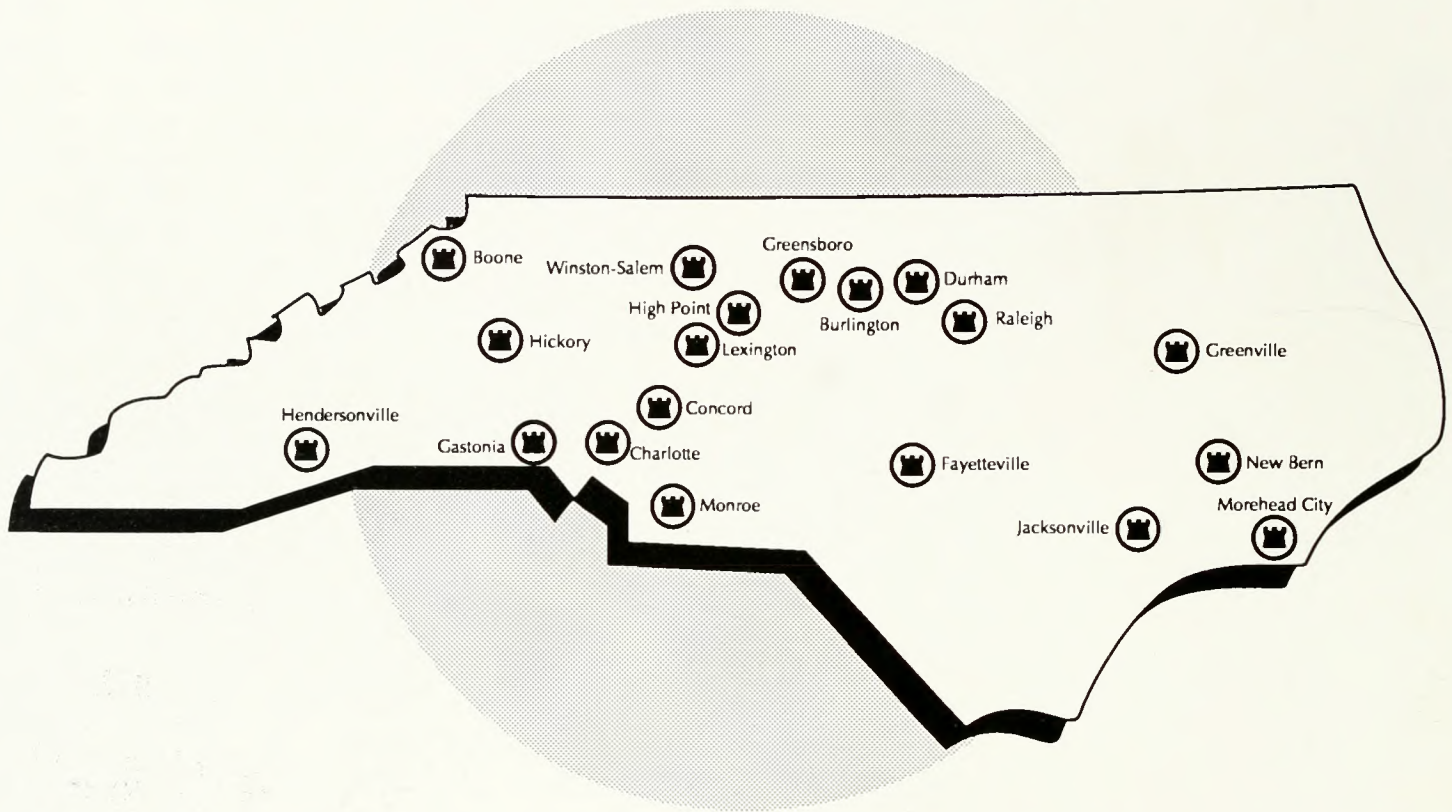
 **QUARTERLY**

**Volume 42, No. 1**

# **The North Carolina State Bar Lawyer's Handbook**

An official publication of the North Carolina State Bar containing the rules and regulations of the North Carolina State Bar, the annotated Rules of Professional Conduct, all RPC ethics opinions, trust account guidelines, and the 1995 directory of board certified legal specialists.

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# Foreword

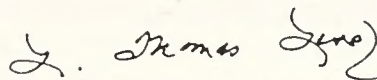
## A Lawyer's Handbook - Finally

Each year the Council of the North Carolina State Bar makes many policy decisions in the process of regulating the legal profession. For the most part, these decisions are embodied in new or amended rules and regulations, and ethics opinions. Although these decisions are regularly reported in the State Bar's quarterly *Newsletter*, they have not been compiled since 1970. Since 1970 the old Canons of Ethics have been replaced, first by the Code of Professional Responsibility and later by the Rules of Professional Conduct; hundreds of ethics opinions have been predicated upon these newer ethical rules; and the rules and regulations of the State Bar have been often amended, greatly expanded, and completely recodified. Over time these materials became scattered and organizationally incoherent, frustrating and confusing lawyers with questions of professional responsibility.

The *Lawyer's Handbook* ameliorates this situation by pulling together in a single volume all of the materials, exclusive of the statutes themselves, which bear upon professional regulation and professional responsibility. Each year every active member of the State Bar will receive an updated copy of the *Handbook* in lieu of the regular winter edition of the *North Carolina State Bar Quarterly*. In order to stay current, lawyers will need only retain the current year's edition of the *Lawyer's Handbook* and the *Newsletters* that accumulate during that year. Lawyers may discard the old "Bluebook," "Greenbook," and "Redbook" and use the *Lawyer's Handbook* as their exclusive reference.

Among the materials included in the *Handbook* are the recently recodified Rules and Regulations of the North Carolina State Bar including the annotated Rules of Professional Conduct, the final and definitive text of every published ethics opinion (RPC) adopted by the council since the promulgation of the Rules of Professional Conduct in 1985, a comprehensive and user-friendly index to those ethics opinions, a concise guide to trust account maintenance, and an official directory of board-certified specialists.

The presentation of these materials in this format should enable the members of the North Carolina State Bar to better understand how the State Bar functions as the instrumentality of professional self-regulation in our state. Beyond that, it is hoped that by making these materials more accessible, a greater percentage of lawyers will be encouraged to participate more actively in the regulatory effort. As more lawyers become involved, the quality of professional governance will increase and the independence of the profession, which is after all the justification for self-regulation, will be strengthened.



L. Thomas Lunsford, II, Executive Director  
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Mr. Matheny will be available for criminal, civil and indigent court appointed matters. Mr. Durham will continue to be of service to members of the bar in civil cases involving wills, deeds, contracts, guaranty agreements, power-of-attorney cases and other documents normally involved in the channels of commercial business. Due to many strong requests from law firms over the state, Jim Durham will continue to represent his clients as an expert witness in the courts of our state as usual.



Mr. Matheny received his training in the field of Questioned Documents with the United States Department of Treasury, Georgetown University, United States Postal Laboratory, Alcohol, Tobacco and Firearms Documents Section, all in Washington, D.C.

Mr. Matheny became the Questioned Documents Supervisor with the North Carolina State Bureau of Investigation Laboratory in 1972 and served in this capacity for twenty years. He is also a 1969 graduate of the First SBI Academy.

Mr. Matheny has had close contact with law enforcement agencies, district attorneys and judges in the state. He has given expert testimony in both federal and state courts in North Carolina. He was also employed with the Federal Bureau of Investigation for four and one-half years.

As the State's Senior Examiner he has experienced a variety of Questioned Documents problems for law enforcement agencies, state departments, state institutions, federal-state related agencies and military installations based in North Carolina.

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Mr. Durham has continuously been in the field of document examinations for 44 years. He served with the North Carolina State Bureau of Investigation as the State's Examiner for 18 years in the courts of this State. He has been in private practice for 25 years. Mr. Durham directed the State's major embezzlement and fraud cases during his tenure with the SBI. He has given expert testimony in this state and surrounding states of the mid-Atlantic region. Mr. Durham does extensive work for industry in the Research Triangle and piedmont regions of North Carolina.

As the State's Document Examiner he has experienced a wide variety of document problems for all law enforcement agencies, state departments, state institutions, and many federal-state related agencies. He has also conducted document examinations for all the military installations based in North Carolina. His career with the State Bureau of Investigation included serving as both Assistant Director and Acting Director.

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45	17.12	13.96	21.33	18.33	47.08	39.58	85.83	70.00	159.17	127.50
50	23.96	17.71	30.00	22.83	68.75	50.83	123.33	92.92	225.00	170.83
55	32.50	22.50	43.75	29.67	103.12	67.92	195.83	127.08	358.33	235.00
60	48.54	29.58	65.00	39.25	156.25	91.87	295.83	174.58	550.00	324.17
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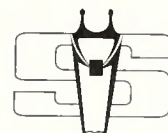
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## Notice of Intent to Seek Reinstatement by Disbarred Attorney Before the Disciplinary Hearing Commission

In the Matter of the Reinstatement of  
REGINALD L. FRAZIER

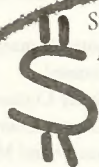
Take Notice that the undersigned intends to file a petition for reinstatement of his license to practice law pursuant to Section 25 of the Discipline and Disbarment Rules of the North Carolina State Bar.

Frazier was disbarred by the Disciplinary Hearing Commission of the North Carolina State Bar on November 6, 1989. The commission found that Frazier attempted to persuade a witness to sign false statements on at least two occasions in 1989. The commission further found that Frazier intended to use the statements to challenge a disciplinary order which had been entered by the commission in 1988, suspending Frazier from the practice of law.

Individuals who wish to note their opposition or concurrence with the petition should do so by filing written notice with the secretary of the N.C. State Bar, P.O. Box 25908, Raleigh, NC 27611, before June 20, 1995.

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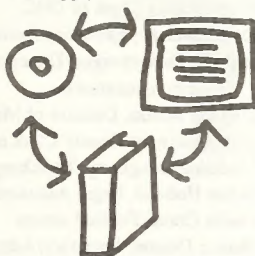
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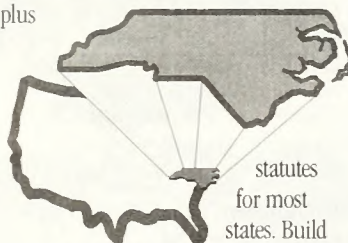
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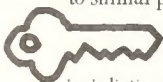
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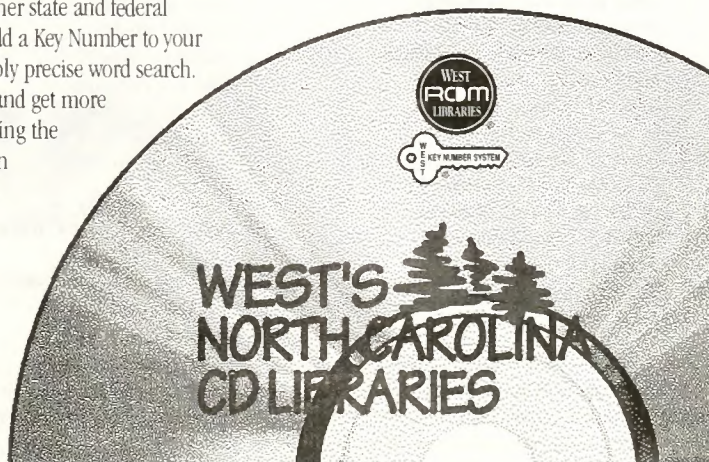
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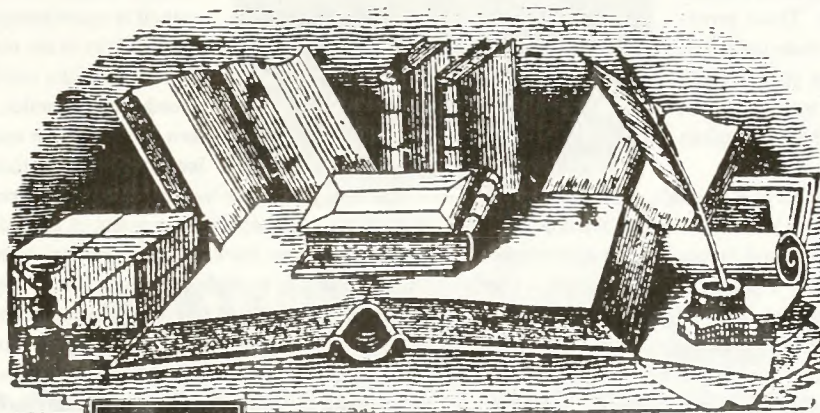
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# The President's Message

## Charles M. Davis

Chapter 84 of the North Carolina General Statutes governs the practice of law. The North Carolina State Bar was created by Statute adopted by the North Carolina General Assembly in 1933. Although a few sections of Chapter 84 have been amended from time to time, no substantial changes have been made since it was originally adopted. For instance, the original legislation provided that councilors be paid a per diem of \$10 per day, and reimbursed ten cents per mile for miles traveled in connection with State Bar business. These provisions remain in force today. Councilors today devote approximately fifteen days per year to State Bar work. I do not believe that it is reasonable that they be compensated at the same rate councilors were compensated in 1933.

In the early part of his administration, past president Bob Robinson appointed a committee to review Chapter 84 of the General Statutes as it relates to the governance of the State Bar and to recommend appropriate amendments to the General Assembly. I chaired that committee. After a great deal of study and numerous meetings, the committee reported to the Bar council in July of 1994 its recommendations that twenty-six sections of Chapter 84 be revised and that one section be relocated. The State Bar council at its July 1994 meeting accepted the report from the Chapter 84 Study Committee and had the report published in the *State Bar Newsletter* so that lawyers would have an opportunity to comment on the proposals. As a result of the publication, only one letter in opposition to the suggested changes was received. The recommended changes were presented to the State Bar's Long Range Planning Meeting in September 1994. Leaders of the various voluntary bars and the judiciary, including former Chief Justice James G. Exum, attended this meeting and enthusiastically greeted the State Bar's proposed changes to Chapter 84. At the October council meeting, the council unanimously voted that the recommended changes in Chapter 84 be submitted to the General Assembly during the 1995 legislative session. As a result of the council action, leaders of the General Assembly have been contacted. The response from the legislative leaders has been most encouraging. Majority Leader Leo Daughtry has agreed to support the legislation in the State House of Representatives, and State Senators Frank Ballance, John Kerr, and Fletcher Hartsell have introduced the legislation in the North Carolina Senate. The proposed legislation is Senate Bill 166. I am writing this message to solicit your support, to encourage you to contact your legislators, and to urge them to support the Chapter 84 legislation.

Even though space does not permit me to discuss each suggested revision, I do want to highlight in the following paragraphs the major recommended changes contained in the package sent to the legislature.

At the present time, the State Bar council consists of fifty-seven members—four officers, three lay members appointed by the governor, and fifty lawyer members elected from the various judicial districts throughout the state. The 1987 legislature amended Chapter 84 to provide that each judicial district would have at least one councilor. By the terms of the 1987 legislation, the number of judicial districts for State Bar purposes was fixed at thirty-four. This left sixteen councilors for apportionment throughout the state based on lawyer population. Since 1987 five new judicial districts have been created by the legislature. Each of the newly created districts has voiced its desire to have its own councilor. If

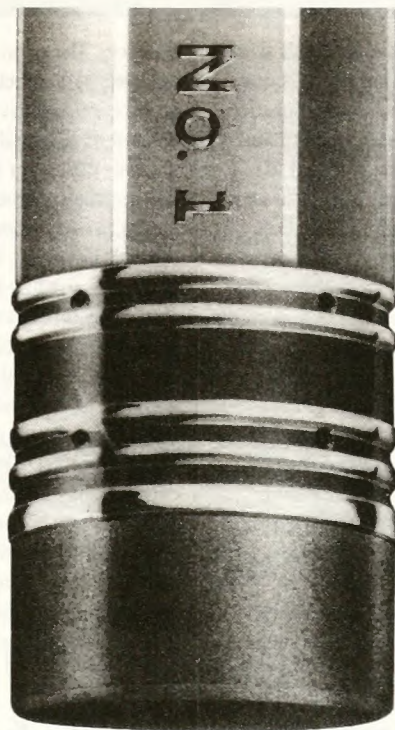


each of the newly created districts receives a councilor, the number of at-large councilors will be reduced from sixteen to eleven. If that happens, the representation of metropolitan bars will be diluted and the likelihood of women and minorities being elected to the council will be greatly reduced. As history indicates, those districts with more than one councilor are more likely to elect minorities and women as opposed to single councilor districts. For that reason, the council is recommending that the number of lawyer members to the council be increased to fifty-five. Each of the newly created districts will be afforded its councilor, and there will still be sixteen councilors for apportionment according to lawyer population throughout the state.

The legislation also includes an enabling provision allowing the State Bar council to establish the amount of annual membership fee. In the past when a dues increase was necessary to offset the rising cost of existing programs or to enable the State Bar to implement new programs such as the recently created Lawyers' Management Assistance Program, the officers of the State Bar and others had to lobby the legislature to obtain a dues increase to meet the elevated expenses. It has been customary in the past for the officers, with the assistance of financial advisors, to adopt ten year projected budgets and to ask the legislature for dues increases to support those budgets. In the 1970s and 1980s when interest rates were high, the council was able to make wise and sound investments and to meet the ten year budget projections. Due to reduced interest rates and the uncertain economy we now face, however, the dues assessment approved in 1989 which increased the dues from \$90.00 per year to \$135.00 per year will not carry the State Bar through the rest of the decade.

Since the lawyers in North Carolina elect members to the State Bar council, it is the feeling of the councilors that the council should have the authority to establish the annual dues. The pending legislation includes a provision to give the State Bar council the authority to adjust the annual dues subject to approval by the Supreme Court. It is the belief of the council that since the Supreme Court has to approve all of the State Bar's rule changes, it would be much less cumbersome and far more convenient to seek court approval for dues adjustments than to wait for legislative approval.

The pending legislation also includes a provision allowing the council to establish appropriate per diem compensation for councilors, and to reimburse councilors for using personal automobiles at the same rate per mile allowed to state employees when engaged in official state business. As mentioned earlier in this message, councilors today receive ten dollars per diem and are reimbursed ten cents per mile for the use of their automobiles in connection with State Bar business. The current per diem and mileage reimbursement rates were established in 1933 with the enactment of Chapter 84 of the General Statutes and they have not been changed since that time. I am sure that when Chapter 84 was enacted in 1933, the per diem and mileage reimbursement rates were adequate, but in the 1990s they are certainly not sufficient. The legislation pending in the General Assembly now places in the council the authority to establish an appropriate per diem. Any new per diem established will be subject to approval by the Supreme Court. All of the members of the State



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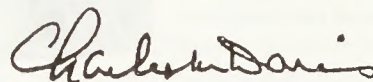
Bar council are hard-working, dedicated, and energetic individuals who contribute untold hours to the work of the State Bar. I believe it is only fair and just that the councilors receive adequate per diem compensation and be fairly reimbursed for the use of their cars on State Bar business.

Several years ago, a lawyer was convicted of extortion and sent to prison. An appeal was filed and the attorney retained his license to practice law during the entire time he remained in prison. Currently, G.S. 84-24(d) provides for the imposition of discipline upon a conviction of or the entry of a plea of guilty or no contest to a criminal offense showing professional unfitness. However, any disciplinary action, based upon the conviction, is automatically stayed pending appeal. The convicted felon referred to above was allowed to retain his law license to practice law long after his guilt had been adjudicated. In the pending legislation, there is a provision to provide for the imposition of discipline immediately following conviction. This would not be inconsistent with an attorney's right to procedural due process. The attorney case would have already been afforded ample notice and have had an opportunity for hearing in a forum enjoying the highest standard of proof. The recommended change would spare the public considerable risk and the profession considerable embarrassment and is consistent with similar measures already in place in several jurisdictions throughout the country.

The pending legislation includes a provision to allow the council to issue advisory opinions in response to inquiries from members of the Bar or the public regarding whether contemplated conduct would constitute the unauthorized practice of law. The State Bar council has long had the authority to investigate situations appearing to involve the unauthorized practice of law and to bring civil actions to enjoin such unauthorized

practice. The council has never been specifically authorized to issue opinions as to whether certain contemplated conduct might violate the prohibition against unauthorized practice. Without such authority, the council has generally been unwilling to respond to the many requests it receives each year for advice. Advice is often sought by persons or entities desiring, in good faith, to comply with the law; and the council's inability to offer interpretive advice can leave those inquiring in a very difficult position. The inquiring party must either abandon the activity or risk being sued by the State Bar (or prosecuted by the district attorney) if a decision is made to proceed. Councilors believe that citizens should be able to avoid this dilemma by seeking the advice of the State Bar. The same expertise which is necessary to determine whether actual conduct violates the law and ought to be enjoined can and should be used to evaluate proposed conduct.

These are not all of the proposed changes in Chapter 84, but, in my opinion, they are the ones of greatest significance. I hope you will agree with the council that these proposed changes are necessary and that they will better enable the council to do its job in protecting the public as well as enabling lawyers to provide the public with better representation. It is my sincere hope that you will contact your senators and representatives in the legislature and encourage them to support the pending legislation.



Charles M. Davis, President, The North Carolina State Bar

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# Rules and Regulations of the North Carolina State Bar

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# Title 27 of the North Carolina Administrative Code

## The North Carolina State Bar

### Chapter 1

## Rules and Regulations of the North Carolina State Bar

**Editor's Note:** The Rules and Regulations of the North Carolina State Bar are published officially in the North Carolina Reports and the North Carolina Administrative Code - Title 27. They may be cited properly with reference to the Administrative Code. For instance, Rule 7.4 of the Rules of Professional Conduct would be cited as 27 NCAC 2 7.4.

### SUBCHAPTER A

## Organization of the North Carolina State Bar

#### Section .0100 Functions

##### .0101 Purpose

The North Carolina State Bar shall foster the following purposes, namely:

- (1) to cultivate and advance the science of jurisprudence;
- (2) to promote reform in the law and in judicial procedure;
- (3) to facilitate the administration of justice;
- (4) to uphold and elevate the standards of honor, integrity and courtesy in the legal profession;
- (5) to encourage higher and better education for membership in the profession;
- (6) to promote a spirit of cordiality and unity among the members of the Bar;
- (7) to perform all duties imposed by law.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

##### .0102 Division of Work

(a) To facilitate the work for the accomplishment of the above enumerated purposes, the council may, from time to time, classify such work under appropriate sections and committees, either standing or special, of the North Carolina State Bar.

(b) The council shall determine the number of members, composition, method of appointment or election, functions, powers and duties, structure, authority to act, and other matters relating to each committee.

(c) Any committee may, at the discretion of the appointing or electing authority, be composed of council members or members of the North Carolina State Bar who are not members of the council or of lay persons or of any combination.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23

Readopted Effective December 8, 1994

##### .0103 Cooperation with Local Bar Association Committees

The sections and committees so appointed may secure the cooperation of like sections and committees of the North Carolina Bar Association and all local bar associations of the state.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

##### .0104 Organization of Local Bar Associations

The council shall encourage and foster the organization of local bar associations.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

##### .0105 Annual Program

The council shall provide a suitable program for each annual meeting of the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

##### .0106 Reports Made to Annual Meeting

The reports of the several sections and committees, with their recommendations, shall be delivered to the secretary of the North Carolina State Bar at least 30 days before the annual meeting. Such reports, together with any reports from special committees that the council desires to present to the annual meeting, may be printed and sent to each member of the North Carolina State Bar at least 20 days before such meeting. Nothing herein shall preclude any section, committee or the council from presenting a report of recommendation that has not been so printed and mailed.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### Section .0200 Membership - Annual Membership Fees

##### .0201 Classes of Membership

###### (a) Two Classes of Membership

Members of the North Carolina State Bar shall be divided into two classes: active members and inactive members.

###### (b) Active Members

The active members shall be all persons who have obtained a license entitling them to practice law in North Carolina, including persons serving as a justice or judge of any state or federal court in this state, unless classified as an inactive member by the council. All active members must pay the annual membership fee.

###### (c) Inactive Members

The inactive members shall include all persons who have been admitted to the practice of law in North Carolina but who the council has found are not engaged in the practice of law or holding themselves out as practicing attorneys and who do not occupy any public or private position in which they may be called upon to give legal advice or counsel or to examine the law or to pass upon the legal effect of any act, document or law. Inactive members of the North Carolina State Bar may not practice law and are exempt from payment of membership dues during the period in which they are inactive members. For purposes of the State Bar's membership records, the category of inactive members shall be further divided into the following subcategories:

(1) Retired/nonpracticing

This subcategory includes those members who are not engaged in the practice of law or holding themselves out as practicing attorneys and who are retired, hold positions unrelated to the practice of law, or practice law in other jurisdictions.

(2) Disability inactive status

This subcategory includes members who suffer from a mental or physical condition which significantly impairs the professional judgment, performance or competence of an attorney, as determined by the courts, the council or the Disciplinary Hearing Commission.

(3) Disciplinary suspensions/disbarments

This subcategory includes those members who have been suspended from the practice of law or who have been disbarred by the courts, the council or the Disciplinary Hearing Commission for one or more violations of the Rules of Professional Conduct.

(4) Administrative suspensions

This subcategory includes those members who have been suspended from the practice of law for failure to comply with the regulations regarding mandatory continuing legal education, payment of membership fees, or payment of late fees pursuant to these rules.

History Note: Statutory Authority G.S. 84-16; G.S. 84-23

Readopted Effective December 8, 1994

## **.0202 Register of Members**

(a) Initial Registration with State Bar

Every member shall register by completing and returning to the North Carolina State Bar a signed registration card containing the following information:

(1) name and address;

(2) date;

(3) date passed examination to practice in North Carolina;

(4) date and place sworn in as an attorney in North Carolina;

(5) date and place of birth;

(6) list of all other jurisdictions where the member has been admitted to the practice of law and date of admission;

(7) whether suspended or disbarred from the practice of law in any jurisdiction or court, and if so, when and where, and when readmitted.

(b) Membership Records of State Bar

The secretary shall keep a permanent register for the enrollment of members of the North Carolina State Bar. In appropriate places therein entries shall be made showing the address of each member, date of registration and class of membership, date of transfer from one class to another, if any, date and period of suspension, if any, and such other useful data which the council may from time to time require.

History Note: Statutory Authority G.S. 84-23; G.S. 84-34

Readopted Effective December 8, 1994

## **.0203 Annual Membership Fees**

(a) Amount and Due Date

The annual membership fee shall be in the amount as provided by law and shall be due and payable to the secretary of the North Carolina State Bar on January 1 of each year and the same shall become delinquent if not paid on or before July 1 of each year.

(b) Waiver of All or Part of Dues

No part of the annual membership fee shall be prorated or apportioned to fractional parts of the year, and no part of the membership fees shall be waived or rebated for any reason with the following exceptions:

(1) A person licensed to practice law in North Carolina for the first time by examination or comity shall not be liable for dues during the year in which the person is admitted;

(2) A person licensed to practice law in North Carolina serving in the armed forces, whether in a legal or nonlegal capacity, will be exempt from payment of dues so long as the member is on active duty in the military service;

(3) A person licensed to practice law in North Carolina who files a petition for inactive status before December 31 of a given year shall not be liable for the membership fee for the following year if the petition is granted.

History Note: Statutory Authority G.S. 84-23; G.S. 84-34

Readopted Effective December 8, 1994

## **Section .0300 Election and Succession of Officers**

### **.0301 Officers**

(a) The officers of the North Carolina State Bar and the council shall consist of a president, a president-elect, a vice-president, and an immediate past president. These officers shall be deemed members of the council in all respects.

(b) There shall be a secretary who shall also have the title of executive director. The secretary shall not be a member of the council.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23

Readopted Effective December 8, 1994

### **.0302 Eligibility for Office**

The president, president-elect, and vice-president need not be members of the council at the time of their election.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23

Readopted Effective December 8, 1994

### **.0303 Term of Office**

(a) The term of each office shall be one year beginning at the conclusion of the annual meeting. Each officer will hold office until a successor is elected and qualified.

(b) The president shall assume the office of immediate past president at the conclusion of the term as president. The president-elect shall assume the office of president at the conclusion of the annual meeting following the term as president-elect.

History Note: Statutory Authority G.S. 84-21; G.S. 84-22; G.S. 84-23

Readopted Effective December 8, 1994

### **.0304 Elections**

(a) A president-elect, vice-president and secretary shall be elected annually by the council at an election to take place at the council meeting held during the annual meeting of the North Carolina State Bar. All elections will be conducted by secret ballot.

(b) If there are more than two candidates for an office, then any candidate receiving a majority of the votes shall be elected. If no candidate receives a majority, then a run-off shall be held between the two candidates receiving the highest number of votes.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23

Readopted Effective December 8, 1994

### **.0305 Nominating Committee**

(a) There shall be a Nominating Committee appointed to nominate one or more candidates for each of the offices. The Nominating Committee shall be composed of the immediate past president and the five most recent living past presidents who are in good standing with the North Carolina State Bar. The Nominating Committee shall meet prior to the council meeting at which the election of officers will be held. The Nominating Committee shall submit its nominations in writing to the secretary

at least 45 days prior to the election, and the secretary shall transmit the report by mail to the members of the council at least 30 days prior to the election.

(b) At the council meeting at which elections are held, the floor shall be open for additional nominations for each office at the time of the election.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23

Readopted Effective December 8, 1994

#### **.0306 Vacancies and Succession**

(a) If the office of president becomes vacant for any reason, including resignation, death, disqualification, or permanent inability, the president-elect shall become president for the unexpired term and the next term. If the office of the president-elect becomes vacant because the president-elect must assume the presidency under the foregoing provision of this section, then the vice-president shall become the president-elect for the unexpired term and at the end of the unexpired term to which the vice-president ascended the office will become vacant and an election held in accordance with Rule .0304 of this subchapter; if the office of president-elect becomes vacant for any other reason, the vice-president shall become the president-elect for the unexpired term following which said officer shall assume the presidency as if elected president-elect. If the office of vice-president or secretary becomes vacant for any reason, including resignation, death, disqualification, or permanent inability, or if the office of president or president-elect becomes vacant without an available successor under these provisions then the office will be filled by election by the council at a special meeting of the council with such notice as required by Rule .0602 of this subchapter or at the next regularly scheduled meeting of the council.

(b) If the president is absent or unable to preside at any meeting of the North Carolina State Bar or the council, the president-elect shall preside, or if the president-elect is unavailable, then the vice-president shall preside. If none are available, then the council shall elect a member to preside during the meeting.

(c) If the president is absent from the state or for any reason is temporarily unable to perform the duties of office, the president-elect shall assume those duties until the president returns or becomes able to resume the duties. If the president-elect is unable to perform the duties, then the council may select one of its members to assume the duties for the period of inability.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### **.0307 Removal from Office**

The council may, upon giving due notice and an opportunity to be heard, remove from office any officer found by the council to have engaged in misconduct or to have a disability, including misconduct not related to the office but so infamous as to render the offender unfit for the office, misconduct amounting to noncriminal misconduct in office and misconduct which is both criminal and misconduct in office.

History Note: Statutory Authority G.S. 84-21; 84-23

Readopted Effective December 8, 1994

### **Section .0400 Duties of Officers**

#### **.0401 Compensation of Officers**

The secretary shall receive a salary fixed by the council. All other officers shall serve without compensation except the per diem allowances fixed by statute for members of the council.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### **.0402 President**

The president shall preside over meetings of the North Carolina State Bar and the council. The president shall sign all resolutions and orders of the council in the capacity of president. The president shall execute,

along with the secretary, all contracts ordered by the council. The president will perform all other duties prescribed for the office by the council.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### **.0403 President-Elect, Vice-President, and Immediate Past President**

The president-elect, vice-president, and immediate past president will perform all duties prescribed for the office by the council.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### **.0404 Secretary**

The secretary shall attend all meetings of the council and of the North Carolina State Bar, and shall record the proceedings of all such meetings. The secretary shall, with the president, president-elect or vice-president, execute all contracts ordered by the council. He or she shall have custody of the seal of the North Carolina State Bar, and shall affix it to all documents executed on behalf of the council or certified as emanating from the council. The secretary shall take charge of all funds paid into the North Carolina State Bar and deposit them in some bank selected by the council; he or she shall cause books of accounts to be kept, which shall be the property of the North Carolina State Bar and which shall be open to the inspection of any officer, committee or member of the North Carolina State Bar during usual business hours. At each January meeting of the council, the secretary shall make a full report of receipts and disbursements since the previous annual report, together with a list of all outstanding obligations of the North Carolina State Bar. The books of accounts shall be audited as of December 31 of each year and the secretary shall publish same in the annual reports as referred to above. He or she shall perform such other duties as may be imposed upon him or her, and shall give bond for the faithful performance of his or her duties in an amount to be fixed by the council with surety to be approved by the council.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **Section .0500 Meetings of the North Carolina State Bar**

#### **.0501 Annual Meetings**

The annual meeting of the North Carolina State Bar shall be held at such time and place within the state of North Carolina, after such notice (but not less than 30 days) as the council may determine.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### **.0502 Special Meetings**

(a) Special meetings of the North Carolina State Bar may be called upon 30 days' notice, as follows:

(1) by the secretary, upon direction of the council.

(2) by the secretary, upon the call addressed to the council, of not less than 25% of the active members of the North Carolina State Bar.

(b) At special meetings no subjects shall be dealt with other than those specified in the notice.

History Note: Statutory Authority G.S. 84-23; G.S. 84-33

Readopted Effective December 8, 1994

#### **.0503 Notice of Meetings**

Notice of all meetings shall be given by publication in such newspapers of general circulation as the council may select, or, in the discretion of the council, by mailing notice to the secretary of the several district bars or to the individual active members of the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-23; G.S. 84-33

Readopted Effective December 8, 1994

#### **.0504 Quorum**

At all annual and special meetings of the North Carolina State Bar those active members of the North Carolina State Bar present shall constitute a quorum, and there shall be no voting by proxy.

History Note: Statutory Authority G.S. 84-23; G.S. 84-33

Readopted Effective December 8, 1994

#### **.0505 Parliamentary Rules**

Proceedings at any meeting of the North Carolina State Bar shall be governed by *Roberts' Rules of Order*.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **Section .0600 Meetings of the Council**

#### **.0601 Regular Meetings**

Regular meetings of the council shall be held on the first Friday after the second Monday in each of the months of January, April and July, at such time and place after such notice (but not less than 30 days) as the council may determine; and on the day before the annual meeting of the North Carolina State Bar, at the location of said annual meeting. The hour of meeting shall in each case be at 10 o'clock A.M. Any regular meeting may be adjourned from time to time as a majority of members present may determine.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### **.0602 Special Meetings**

The president in his or her discretion may call special meetings of the council. Upon written request of eight councilors, filed with the secretary requesting the president to call a special meeting of the council, the secretary shall, within five days thereafter, call such special meeting. The date fixed for such meeting shall not be less than five days nor more than ten days from the date of such call.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### **.0603 Notice of Called Special Meetings**

Notice of called special meetings shall be signed by the secretary. The notice shall set forth the day and hour of the meeting and the place for holding the same. Any business may be presented for consideration at such special meeting. Such notice must be given to each councilor unless waived by him or her. A written waiver signed by any councilor shall be equivalent to notice as herein provided. Notice to councilors not waiving as aforesaid shall be in writing and may be communicated by telegraph, or by letter through the United States Mail in the usual course, addressed to each of said councilors at his or her law office address. Notice by telegraph shall be filed with the telegraph carrier for transmission at least three days, and notice by mail shall be deposited in the United States Post Office at least five days, before the day fixed for the special meeting.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### **.0604 Quorum at Meeting of Council**

At meetings of the council the presence of 10 councilors shall constitute a quorum.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.0700 Standing Committees of the Council**

#### **.0701 Standing Committees**

Within 20 days after his or her election, the president of the council shall select the standing committees identified below to serve for one year beginning January 1 of the year succeeding his or her election, provided that the Boards of Continuing Legal Education, Legal Specializa-

tion, the Client Security Fund, and the Interest on Lawyers' Trust Accounts program shall be appointed by the council.

(1) An Executive Committee of not less than five councilors. It shall be the duty of the Executive Committee to perform such duties as the council shall designate, including, however, the auditing of the books and records of the secretary at each regular meeting of the council.

(2) Committee on Legal Ethics and Professional Conduct of not less than three councilors. It shall be the duty of the Committee on Legal Ethics and Professional Conduct to study the Rules of Professional Conduct and make such recommendations from time to time to the council as it may deem proper and necessary; study and determine such questions as may arise as to the meaning and application of the Rules of Professional Conduct, and advise members of the State Bar upon request in respect thereto, and perform such other duties in connection with the Rules of Professional Conduct as it may be requested to perform by the council of the North Carolina State Bar.

(3) Committee on Grievances. The Grievance Committee will consist of not less than 15 members, one of whom will be designated as chairperson. At least one vice-chairperson will be designated. The committee will have as members at least three councilors from each of the judicial divisions of the state. The Grievance Committee will have the powers and duties set forth in Section .0100 of subchapter B of these rules and will report on the status of grievances, investigations, and complaints at regular or special meetings of the council as the Executive Committee may direct.

(4) Committee on Legislation and Law Reform of not less than three councilors. It shall be the duty of the Committee on Legislation and Law Reform to examine proposed changes in the law; to examine and propose changes in the law and judicial procedure; to promote the simplification of law and procedure; and perform such other duties in connection with the improvement of law and procedure as may from time to time be requested by the council of the North Carolina State Bar.

The Committee on Legislation and Law Reform shall not appear before committees of the legislature, except upon the approval of the council, nor shall it make specific endorsements of changes in the laws or of new laws except with the consent of the council.

(5) Committee on Consumer Protection of not less than three councilors.

(6) Committee on Membership and Fees of not less than three councilors.

(7) Committee on Legal Aid to Indigents and Referrals consisting of not less than five councilors. The committee shall aid and assist the judicial districts of the North Carolina State Bar in establishing plans for the representation of indigents in certain criminal cases and lend assistance and advise in the carrying out of these programs in accordance with the laws of the state of North Carolina and the ethics of the legal profession.

(8) Professional Organizations Committee of not less than five nor more than seven councilors.

(9) Positive Action for Lawyers Committee of not less than seven members, one of whom shall be designated as chairperson and one as vice-chairperson, for the purpose of implementing a program of intervention for lawyers with substance abuse problems which affects their professional conduct; provided, no member of the Grievance Committee shall be a member of the Positive Action for Lawyers Committee. Such committee's creation shall not be construed so as to hinder, limit or otherwise affect the disciplinary process.

(10) IOLTA Board of Trustees composed of nine members appointed by the Council of the North Carolina State Bar, at least six of whom must be attorneys in good standing and authorized to practice law in North Carolina. This committee shall carry out the provisions of the Plan for Disposition of Funds Received by the North Carolina State Bar from Interest on Trust Accounts.

(11) Board of Legal Specialization composed of nine members appointed by the Council of the North Carolina State Bar. Specialization shall be a voluntary endeavor and not mandatory, and shall not be funded by membership fees of the North Carolina State Bar.

(12) Client Security Fund Board of Trustees composed of five members, four of whom must be attorneys in good standing and authorized to practice law in North Carolina, and one who must not be a licensed attorney.

(a) The Client Security Fund Board of Trustees of the North Carolina State Bar is a standing committee of the State Bar Council, established by the council pursuant to an order of the Supreme Court of North Carolina dated August 29, 1984. Its purpose is to reimburse, subject to certain limitations, clients who have suffered financial loss as the result of dishonest conduct of lawyers engaged in the private practice of law in North Carolina.

(b) The Client Security Fund Board of Trustees shall have the powers and duties set forth in the Rules of the North Carolina State Bar Client Security Fund. The Council of the North Carolina State Bar is authorized, subject to approval of the court, to promulgate further regulations and rules of procedure for the board for the management of its funds and affairs, for the presentation of applications and their processing, for the payment of claims that are allowed, and for the subrogation or assignment of the rights of any reimbursed applicant.

(13) Committee on Professionalism. The Professionalism Committee of the North Carolina State Bar Council is the standing committee of the council established and authorized to consider means and methods of enhancing the degree of professionalism exhibited in the practice and conduct of North Carolina lawyers so as to reduce the incidence of unethical conduct and promote the interests of the public by ensuring the competence, integrity, and conscientiousness of members of the Bar. "Professionalism" for these purposes means conduct characterized by integrity, adherence to the rules of professional conduct, allegiance to the system of justice and commitment to public service.

(14) Of Counsel Committee. A committee of at least nine members shall design and implement programs to enhance the competence and professionalism of lawyers through voluntary efforts of members of the Bar. These programs shall be designed to orient, counsel, educate, and advise fellow lawyers, educators, students, and persons in ancillary occupations regarding the practice of the profession and work related thereto.

(15) Legal Assistance for Military Personnel (LAMP) Committee. A committee of at least four councilors and nine noncouncilors to serve as a liaison group with lawyers serving military personnel in North Carolina. The purpose is to give improved legal service to military personnel and dependents stationed in North Carolina, to assist armed forces legal assistance officers with matters of North Carolina law, to provide representation for service personnel in the civilian courts of this state, and to provide a referral service for legal officers needing advice and assistance.

(16) Disaster Response Committee. A committee of not less than five councilors and noncouncilors who will implement a Disaster Response Plan adopted by the Council of the North Carolina State Bar. The purpose of the Disaster Response Committee is to provide for standing representatives of the North Carolina State Bar who will implement a disaster response plan and provide publicity and on-site representation to ensure that legal representation is available to victims of disasters and to prevent the improper solicitation of victims by attorneys at law or individuals acting on behalf of attorneys.

(17) Fee Arbitration Committee. A committee of five councilors and four noncouncilors to supervise the administration of a program of fee arbitration which is to be administered by the several judicial district bars of the North Carolina State Bar. At least one councilor shall be appointed from each judicial division. The president shall also appoint a chairperson from among the nine members of the committee.

(18) Board of Continuing Legal Education. A committee of not less than nine members appointed as set forth in the Rules Governing the Administration of the Continuing Legal Education Program. The Board of Continuing Legal Education shall have the responsibility for operating the continuing legal education program subject to the statutes governing the practice of law, the authority of the council, and the rules of governance of the board.

(19) Lawyers' Trust Accounts Committee.

(20) Budget, Finance, and Audit Committee. A committee of not less than three members.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23

Readopted Effective December 8, 1994

## **Section .0800 Election and Appointment of State Bar Councilors**

### **.0801 Purpose**

The purpose of these rules is to promulgate fair, open, and uniform procedures to elect and appoint North Carolina State Bar councilors in all judicial district bars. These rules should encourage a broader and more diverse participation and representation of all attorneys in the election and appointment of councilors.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.0802 Election - When Held; Notice; Nominations**

(a) Every judicial district bar, in any calendar year at the end of which the term of one of more of its councilors will expire, shall fill said vacancy or vacancies at an election to be held at a meeting during that year.

(b) The officers of the district bar shall fix the time and place of such election and shall give to each active member (as defined in G.S. 84-16) of the district bar a written notice thereof directed to him or her at his or her address on file with the North Carolina State Bar, which notice shall be placed in the United States Mail, postage prepaid, at least 30 days prior to the date of the election.

(c) The district bar shall submit its written notice of the election to the North Carolina State Bar, at least six weeks before the date of the election.

(d) The North Carolina State Bar will, at its expense, mail these notices.

(e) The notice shall state the date, time and place of the election, give the number of vacancies to be filled, name a person or committee named by the local bar to which nominations may be made prior to the meeting, advise that additional nominations may be made from the floor at the meeting itself, and advise that all elections must be by a majority of the votes cast by those present and voting.

History Note: Statutory Authority G.S. 84-18; G.S. 84-23

Readopted Effective December 8, 1994

### **.0803 Same - Voting Procedures**

(a) All nominations made either before or at the meeting shall be voted on at the meeting by secret ballot of those present and voting.

(b) Cumulative voting shall not be permitted.

(c) Nominees receiving a majority of the votes cast shall be declared elected.

History Note: Statutory Authority G.S. 84-18; G.S. 84-23

Readopted Effective December 8, 1994

### **.0804 Vacancies**

The unexpired term of any councilor whose office has become vacant because of resignation, death, or any cause other than the expiration of a term, shall be filled within 90 days of the occurrence of the vacancy by an election conducted in the same manner as above provided.

History Note: Statutory Authority G.S. 84-18; 84-23

Readopted Effective December 8, 1994

#### **.0805 Bylaws Providing for Geographical Rotation or Division of Representation**

Nothing contained herein shall prohibit the district bar of any judicial district from adopting bylaws providing for the geographical rotation or division of its councilor representation.

History Note: Statutory Authority G.S. 84-18; 84-23

Readopted Effective December 8, 1994

#### **Section .0900 Reserved**

#### **Section .1000 Reserved**

#### **Section .1100 Office of the North Carolina State Bar**

##### **.1101 Office**

Until otherwise ordered by the council, the office of the North Carolina State Bar shall be maintained in the city of Raleigh at such place as may be designated by the council.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### **Section .1200 Filing Papers with and Serving the North Carolina State Bar**

##### **.1201 When Papers Are Filed Under These Rules and Regulations**

Whenever in these rules and regulation there is a requirement that petitions, notices or other documents be filed with or served on the North Carolina State Bar, or the council, the same shall be filed with or served on the secretary of the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-23 Readopted

Effective December 8, 1994

#### **Section .1300 Seal**

##### **.1301 Form and Custody of Seal**

The North Carolina State Bar shall have a seal round in shape and having the words and figures, "The North Carolina State Bar July 1, 1933," with the word "Seal" in the center. The seal shall remain in the custody of the secretary at the office of the North Carolina State Bar, unless otherwise ordered by the council.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **SUBCHAPTER B**

### **Discipline and Disability Rules**

#### **Section .0100 Discipline and Disability of Attorneys**

##### **.0101 General Provisions**

Discipline for misconduct is not intended as punishment for wrongdoing but is for the protection of the public, the courts, and the legal profession. The fact that certain misconduct has remained unchallenged when done by others, or when done at other times, or that it has not been made the subject of earlier disciplinary proceedings, will not be a defense to any charge of misconduct by a member.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

##### **.0102 Procedure for Discipline**

(a) The procedure to discipline members of the bar of this state will be in accordance with the provisions hereinafter set forth.

(b) District bars will not conduct separate proceedings to discipline members of the bar but will assist and cooperate with the North Carolina State Bar in reporting and investigating matters of alleged misconduct on the part of its members.

(c) Concurrent Jurisdiction of State Bar and Courts

(1) The Council of the North Carolina State Bar is vested, as an agency of the state, with the control of the discipline, disbarment, and restoration of attorneys practicing law in this state.

(2) The courts of this state have inherent authority to take disciplinary action against attorneys practicing therein, even in relation to matters not pending in the court exercising disciplinary authority.

(3) The authority of the North Carolina State Bar and the courts to discipline attorneys is separate and distinct, the North Carolina State Bar having derived its jurisdiction by legislative act and the courts from the inherent power of the courts themselves.

(4) Neither the North Carolina State Bar nor the courts are authorized or empowered to act for or in the name of the other, and the disci-

plinary action taken by either entity should be clearly delineated as to the source or basis for the action being taken.

(5) It is the position of the North Carolina State Bar that no trial court has the authority to preempt a North Carolina State Bar disciplinary proceeding with a pending civil or criminal court proceeding involving attorney conduct, or to dismiss a disciplinary proceeding pending before the North Carolina State Bar.

(6) Whenever the North Carolina State Bar learns that a court has initiated an inquiry or proceeding regarding alleged improper or unethical conduct of an attorney, the North Carolina State Bar may defer to the court and stay its own proceeding pending completion of the court's inquiry or proceeding. Upon request, the North Carolina State Bar will assist in the court's inquiry or proceeding.

(7) If the North Carolina State Bar finds probable cause and institutes disciplinary proceedings against an attorney for conduct which subsequently becomes an issue in a criminal or civil proceeding, the court may, in its discretion, defer its inquiry pending the completion of the North Carolina State Bar's proceedings.

(8) Upon the filing of a complaint by the North Carolina State Bar, the North Carolina State Bar will send a copy of the complaint to the chief resident superior court judge and to all superior court judges regularly assigned to the district in which the attorney maintains his or her law office. The North Carolina State Bar will send a copy of the complaint to the district attorney in the district in which the attorney maintains a law office if the complaint alleges criminal activity by the attorney.

(9) The North Carolina State Bar will encourage judges to contact the North Carolina State Bar to determine the status of any relevant complaints filed against an attorney before the court takes disciplinary action against the attorney.

History Note: Statutory Authority G.S. 84-23; G.S. 84-36

Readopted Effective December 8, 1994

### .0103 Definitions

Subject to additional definitions contained in other provisions of this subchapter, the following words and phrases, when used in this subchapter, will have, unless the context clearly indicates otherwise, the meanings given to them in this rule.

(1) Admonition - a written form of discipline imposed in cases in which an attorney has committed a minor violation of the Rules of Professional Conduct.

(2) Appellate division - the appellate division of the general court of justice.

(3) Board - the Board of Continuing Legal Education.

(4) Board of Continuing Legal Education - a standing committee of the council responsible for the administration of a program of mandatory continuing legal education and law practice assistance.

(5) Censure - a written form of discipline more serious than a reprimand issued in cases in which an attorney has violated one or more provisions of the Rules of Professional Conduct and has caused significant harm or potential significant harm to a client, the administration of justice, the profession, or a member of the public, but the misconduct does not require suspension of the attorney's license.

(6) Certificate of conviction - a certified copy of any judgment wherein a member of the North Carolina State Bar is convicted of a criminal offense.

(7) Chairperson of the Grievance Committee - councilor appointed to serve as chairperson of the Grievance Committee of the North Carolina State Bar.

(8) Commission - the Disciplinary Hearing Commission of the North Carolina State Bar.

(9) Commission chairperson - the chairperson of the Disciplinary Hearing Commission of the North Carolina State Bar.

(10) Complainant or complaining witness - any person who has complained of the conduct of any member of the North Carolina State Bar to the North Carolina State Bar.

(11) Complaint - a formal pleading filed in the name of the North Carolina State Bar with the commission against a member of the North Carolina State Bar after a finding of probable cause.

(12) Consolidation of cases - a hearing by a hearing committee of multiple charges, whether related or unrelated in substance, brought against one defendant.

(13) Council - the Council of the North Carolina State Bar.

(14) Councilor - a member of the Council of the North Carolina State Bar.

(15) Counsel - the counsel of the North Carolina State Bar appointed by the council.

(16) Court or courts of this state - a court authorized and established by the constitution or laws of the state of North Carolina.

(17) Defendant - a member of the North Carolina State Bar against whom a finding of probable cause has been made.

(18) Disabled or disability - a mental or physical condition which significantly impairs the professional judgment, performance, or competence of an attorney.

(19) Grievance - alleged misconduct.

(20) Grievance Committee - the Grievance Committee of the North Carolina State Bar.

(21) Hearing committee - a hearing committee designated under Rule .0108(a)(2), .0114(d), .0114(x), .0118(b)(2), .0125(a)(6), .0125(b)(7) or .0125(c)(2) of this subchapter.

(22) Illicit drug - any controlled substance as defined in the North Carolina Controlled Substances Act, section 5, chapter 90, of the North Carolina General Statutes, or its successor, which is used or possessed without a prescription or in violation of the laws of this state or the United States.

(23) Incapacity or incapacitated - condition determined in a judicial proceeding under the laws of this or any other jurisdiction that an attorney is mentally defective, an inebriate, mentally disordered, or incompetent from want of understanding to manage his or her own affairs by reason of the excessive use of intoxicants, drugs, or other cause.

(24) Investigation - the gathering of information with respect to alleged misconduct, alleged disability, or a petition for reinstatement.

(25) Investigator - any person designated to assist in the investigation of alleged misconduct or facts pertinent to a petition for reinstatement.

(26) Letter of caution - communication from the Grievance Committee to an attorney stating that the past conduct of the attorney, while not the basis for discipline, is unprofessional or not in accord with accepted professional practice.

(27) Letter of notice - a communication to a respondent setting forth the substance of a grievance.

(28) Letter of warning - written communication from the Grievance Committee or the commission to an attorney stating that past conduct of the attorney, while not the basis for discipline, is an unintentional, minor, or technical violation of the Rules of Professional Conduct and may be the basis for discipline if continued or repeated.

(29) Member - a member of the North Carolina State Bar.

(30) Office of the Counsel - the office and staff maintained by the counsel of the North Carolina State Bar.

(31) Office of the Secretary - the office and staff maintained by the secretary-treasurer of the North Carolina State Bar.

(32) PALS Committee - Positive Action for Lawyers Committee of the North Carolina State Bar.

(33) Party - after a complaint has been filed, the North Carolina State Bar as plaintiff or the member as defendant.

(34) Plaintiff - after a complaint has been filed, the North Carolina State Bar.

(35) Preliminary hearing - hearing by the Grievance Committee to determine whether probable cause exists.

(36) Probable cause - a finding by the Grievance Committee that there is reasonable cause to believe that a member of the North Carolina State Bar is guilty of misconduct justifying disciplinary action.

(37) Reprimand - a written form of discipline more serious than an admonition issued in cases in which a defendant has violated one or more provisions of the Rules of Professional Conduct and has caused harm or potential harm to a client, the administration of justice, the profession, or a member of the public, but the misconduct does not require a censure.

(38) Respondent - a member of the North Carolina State Bar who has been accused of misconduct or whose conduct is under investigation, but as to which conduct there has not yet been a determination of whether probable cause exists.

(39) Secretary - the secretary-treasurer of the North Carolina State Bar.

(40) Serious crime - the commission of, attempt to commit, conspiracy to commit, solicitation or subornation of any felony or any crime that involves false swearing, misrepresentation, deceit, extortion, theft, bribery, embezzlement, false pretenses, fraud, interference with the judicial or political process, larceny, misappropriation of funds or property, overthrow of the government, perjury, willful failure to file a tax return, or any other offense involving moral turpitude or showing professional unfitness.

(41) Supreme Court - the Supreme Court of North Carolina.

(42) Will - when used in these rules, means a direction or order which is mandatory or obligatory.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### .0104 State Bar Council: Powers and Duties in Discipline and Disability Matters

The Council of the North Carolina State Bar will have the power and duty

- (1) to supervise and conduct disciplinary proceedings in accordance with the provisions hereinafter set forth;
- (2) to appoint members of the commission as provided by statute;
- (3) to appoint a counsel. The counsel will serve at the pleasure of the council. The counsel will be a member of the North Carolina State Bar but will not be permitted to engage in the private practice of law;
- (4) to order the transfer of a member to disability inactive status when such member has been judicially declared incompetent or has been involuntarily committed to institutional care because of incompetence or disability;
- (5) to accept or reject the surrender of the license to practice law of any member of the North Carolina State Bar;
- (6) to order the disbarment of any member whose resignation is accepted or to refer the matter of discipline to the commission for hearing and determination;
- (7) to review the report of any hearing committee upon a petition for reinstatement of a disbarred attorney and to make final determination as to whether the license will be restored.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### **.0105 Chairperson of the Grievance Committee: Powers and Duties**

(a) The chairperson of the Grievance Committee will have the power and duty

- (1) to supervise the activities of the counsel;
- (2) to recommend to the Grievance Committee that an investigation be initiated;
- (3) to recommend to the Grievance Committee that a grievance be dismissed;
- (4) to direct a letter of notice to a respondent;
- (5) to issue, at the direction and in the name of the Grievance Committee, a letter of caution, letter of warning, an admonition, a reprimand, or a censure to a member;
- (6) to notify a respondent that a grievance has been dismissed, and to notify the complainant in accordance with Rule .0121 of this subchapter;
- (7) to call meetings of the Grievance Committee.
- (8) to issue subpoenas in the name of the North Carolina State Bar or direct the secretary to issue such subpoenas;
- (9) to administer or direct the administration of oaths or affirmations to witnesses;
- (10) to sign complaints and petitions in the name of the North Carolina State Bar;
- (11) to determine whether proceedings should be instituted to activate a suspension which has been stayed;
- (12) to enter orders of reciprocal discipline in the name of the Grievance Committee;
- (13) to direct the counsel to institute proceedings in the appropriate forum to determine if an attorney is in violation of an order of the Grievance Committee, the commission, or the council;
- (14) to rule on requests for reconsideration of decisions of the Grievance Committee regarding grievances;
- (15) to tax costs of the disciplinary procedures against any defendant against whom the Grievance Committee imposes discipline, including a minimum administrative cost of \$50;
- (16) in his or her discretion, to refer grievances primarily attributable to unsound law office management to the Board of Continuing Legal Education in accordance with Rule .0112(h) of this subchapter and to so notify the complainant.
- (17) to dismiss a grievance upon request of the complainant, where it appears that there is no probable cause to believe that the respondent has violated the Rules of Professional Conduct and where counsel consents to the dismissal;

(18) to dismiss a grievance where it appears that the grievance has not been filed within the time period set out in Rule .0111(e).

(b) The president, vice-chairperson, or senior council member of the Grievance Committee may perform the functions of the chairperson of the Grievance Committee in any matter when the chairperson is absent or disqualified.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### **.0106 Grievance Committee: Powers and Duties**

The Grievance Committee will have the power and duty

- (1) to direct the counsel to investigate any alleged misconduct or disability of a member of the North Carolina State Bar coming to its attention;
- (2) to hold preliminary hearings, find probable cause and direct that complaints be filed;
- (3) to dismiss grievances upon a finding of no probable cause;
- (4) to issue a letter of caution to a respondent in cases wherein misconduct is not established but the activities of the respondent are unprofessional or not in accord with accepted professional practice. The letter of caution will recommend that the respondent be more professional in his or her practice in one or more ways which are to be specifically identified;
- (5) to issue a letter of warning to a respondent in cases wherein no probable cause is found but it is determined by the Grievance Committee that the conduct of the respondent is an unintentional, minor, or technical violation of the Rules of Professional Conduct. The letter of warning will advise the attorney that he or she may be subject to discipline if such conduct is continued or repeated. The warning will specify in one or more ways the conduct or practice for which the respondent is being warned. A copy of the letter of warning will be maintained in the office of the counsel for three years subject to the confidentiality provisions of Rule .0129 of this subchapter;
- (6) to issue an admonition in cases wherein the defendant has committed a minor violation of the Rules of Professional Conduct;
- (7) to issue a reprimand wherein the defendant has violated one or more provisions of the Rules of Professional Conduct, and has caused harm or potential harm to a client, the administration of justice, the profession, or a member of the public, but the misconduct does not require a censure;
- (8) to issue a censure in cases wherein the defendant has violated one or more provisions of the Rules of Professional Conduct and has caused significant harm or potential significant harm to a client, the administration of justice, the profession, or a member of the public, but the misconduct does not require suspension of the defendant's license;
- (9) to direct that a petition be filed seeking a determination whether a member of the North Carolina State Bar is disabled;
- (10) to include in any order of admonition, reprimand, or censure a provision requiring the defendant to complete a reasonable amount of continuing legal education in addition to the minimum amount required by the North Carolina Supreme Court;
- (11) in its discretion, to refer grievances primarily attributable to unsound law office management to the Board of Continuing Legal Education in accordance with Rule .0112(h) of this subchapter.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### **.0107 Counsel: Powers and Duties**

The counsel will have the power and duty

- (1) to investigate all matters involving alleged misconduct whether initiated by the filing of a grievance or otherwise;
- (2) to recommend to the chairperson of the Grievance Committee that a matter be dismissed, that a letter of caution, or a letter of warning be issued, or that the Grievance Committee hold a preliminary hearing;

(3) to prosecute all disciplinary proceedings before the Grievance Committee, hearing committees, and the courts;

(4) to represent the North Carolina State Bar in any trial, hearing, or other proceeding concerning the alleged disability of a member;

(5) to appear on behalf of the North Carolina State Bar at hearings conducted by the Grievance Committee, hearing committees, or any other agency or court concerning any motion or other matter arising out of a disciplinary or disability proceeding;

(6) to appear at hearings conducted with respect to petitions for reinstatement of license by suspended or disbarred attorneys or by attorneys transferred to disability inactive status, to cross-examine witnesses testifying in support of such petitions, and to present evidence, if any, in opposition to such petitions;

(7) to employ such deputy counsel, investigators, and other administrative personnel in such numbers as the council may authorize;

(8) to maintain permanent records of all matters processed and of the disposition of such matters;

(9) to perform such other duties as the council may direct;

(10) after a finding of probable cause by the Grievance Committee, to designate the particular violations of the Rules of Professional Conduct to be alleged in a formal complaint filed with the commission;

(11) to file amendments to complaints and petitions arising out of the same transactions or occurrences as the allegations in the original complaints or petitions, in the name of the North Carolina State Bar, with the prior approval of the chairperson of the Grievance Committee;

(12) after a complaint is filed with the commission, to dismiss any or all claims in the complaint or to negotiate and recommend consent orders of discipline to the hearing committee.

History Note: Statutory Authority G.S. 84-23; G.S. 84-31

Readopted Effective December 8, 1994

#### **.0108 Chairperson of the Hearing Commission: Powers and Duties**

(a) The chairperson of the Disciplinary Hearing Commission of the North Carolina State Bar will have the power and duty

(1) to receive complaints alleging misconduct and petitions alleging the disability of a member filed by the counsel; petitions requesting reinstatement of license by members who have been involuntarily transferred to disability inactive status, suspended, or disbarred; motions seeking the activation of suspensions which have been stayed; and proposed consent orders of disbarment;

(2) to assign three members of the commission, consisting of two members of the North Carolina State Bar and one nonlawyer to hear complaints, petitions, motions, and posthearing motions pursuant to Rule .0114(z)(2) of this subchapter. The chairperson will designate one of the attorney members as chairperson of the hearing committee. No committee member who hears a disciplinary matter may serve on the committee which hears the attorney's reinstatement petition. The chairperson of the commission may designate himself or herself to serve as one of the attorney members of any hearing committee and will be chairperson of any hearing committee on which he or she serves. Posthearing motions filed pursuant to Rule .0114(z)(2) of this subchapter will be considered by the same hearing committee assigned to the original trial proceeding. Hearing committee members who are ineligible or unable to serve for any reason will be replaced with members selected by the commission chairperson;

(3) to set the time and place for the hearing on each complaint or petition;

(4) to subpoena witnesses and compel their attendance and to compel the production of books, papers, and other documents deemed necessary or material to any hearing. The chairperson may designate the secretary to issue such subpoenas;

(5) to consolidate, in his or her discretion for hearing, two or more cases in which a subsequent complaint or complaints have been

served upon a defendant within ninety days of the date of service of the first or a preceding complaint;

(6) to enter orders disbarring members by consent.

(b) The vice-chairperson of the Disciplinary Hearing Commission may perform the function of the chairperson in any matter when the chairperson is absent or disqualified.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### **.0109 Hearing Committee: Powers and Duties**

Hearing committees of the Disciplinary Hearing Commission of the North Carolina State Bar will have the following powers and duties:

(1) to hold hearings on complaints alleging misconduct, or petitions seeking a determination of disability or reinstatement, or motions seeking the activation of suspensions which have been stayed;

(2) to enter orders regarding discovery and other procedures in connection with such hearings, including, in disability matters, the examination of a member by such qualified medical experts as the committee will designate;

(3) to subpoena witnesses and compel their attendance, and to compel the production of books, papers, and other documents deemed necessary or material to any hearing. Subpoenas will be issued by the chairperson of the hearing committee in the name of the commission. The chairperson may direct the secretary to issue such subpoenas;

(4) to administer or direct the administration of oaths or affirmations to witnesses at hearings;

(5) to make findings of fact and conclusions of law;

(6) to enter orders dismissing complaints in matters before the committee;

(7) to enter orders of discipline against or letters of warning to defendants in matters before the committee;

(8) to tax costs of the disciplinary proceedings against any defendant against whom discipline is imposed, provided, however, that such costs will not include the compensation of any member of the council, committees, or agencies of the North Carolina State Bar;

(9) to enter orders transferring a member to disability inactive status;

(10) to report to the council its findings of fact and recommendations after hearings on petitions for reinstatement of disbarred attorneys;

(11) to grant or deny petitions of attorneys seeking transfer from disability inactive status to active status;

(12) to enter orders reinstating suspended attorneys or denying reinstatement. An order denying reinstatement may include additional sanctions in the event violations of the petitioner's order of suspension are found;

(13) to enter orders activating suspensions which have been stayed or continuing the stays of such suspensions.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28; G.S. 84-28.1

Readopted Effective December 8, 1994

#### **.0110 Secretary: Powers and Duties in Discipline and Disability Matters**

The secretary will have the following powers and duties in regard to discipline and disability procedures:

(1) to receive grievances for transmittal to the counsel, to receive complaints and petitions for transmittal to the commission chairperson, and to receive affidavits of surrender of license for transmittal to the council;

(2) to issue summonses and subpoenas when so directed by the president, the chairperson of the Grievance Committee, the chairperson of the commission, or the chairperson of any hearing committee;

(3) to maintain a record and file of all grievances not dismissed by the Grievance Committee;

(4) to perform all necessary ministerial acts normally performed by the clerk of the superior court in complaints filed before the commission;

(5) to enter orders of reinstatement where petitions for reinstatement of suspended attorneys are unopposed by the counsel;

(6) to dismiss reinstatement petitions based on the petitioner's failure to comply with the rules governing the provision and transmittal of the record of reinstatement proceedings;

(7) to determine the amount of costs assessed in disciplinary proceedings by the commission.

History Note - Statutory Authority G.S. 84-22; G.S. 84-23; G.S. 84-32(c)

Readopted Effective December 8, 1994

#### **.0111 Grievances: Form and Filing**

(a) A grievance may be filed by any person against a member of the North Carolina State Bar. Such grievance may be written or oral, verified or unverified, and may be made initially to the counsel. The counsel may require that a grievance be reduced to writing in affidavit form and may prepare and distribute standard forms for this purpose. Such standard forms will be available from the counsel, secretary, and the offices of the clerks of court in this state. Grievances reduced to writing on such standard forms will be transmitted by the complainant to the secretary.

(b) Upon the direction of the council or the Grievance Committee, the counsel will investigate such conduct of any member as may be specified by the council or Grievance Committee.

(c) The counsel may investigate any matter coming to the attention of the counsel involving alleged misconduct of a member upon receiving authorization from the chairperson of the Grievance Committee. If the counsel receives information that a member has used or is using illicit drugs, the counsel will follow the provisions of Rule .0130 of this subchapter.

(d) The North Carolina State Bar may keep confidential the identity of an attorney or judge who reports alleged misconduct of another attorney pursuant to Rule 1.3 of the Rules of Professional Conduct and who requests to remain anonymous. Notwithstanding the foregoing, the North Carolina State Bar will reveal the identity of a reporting attorney or judge to the respondent attorney where such disclosure is required by law, or by considerations of due process or where identification of the reporting attorney or judge is essential to preparation of the attorney's defense to the grievance and/or a formal disciplinary complaint.

(e) Grievances must be instituted by the filing of a written or oral grievance with the North Carolina State Bar Grievance Committee or a District Bar Grievance Committee within six years from the accrual of the offense, provided that grievances alleging fraud by a lawyer or an offense the discovery of which has been prevented by concealment by the accused lawyer shall not be barred until six years from the accrual of the offense or one year after discovery of the offense by the aggrieved party or by the North Carolina State Bar counsel, whichever is later.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### **.0112 Investigations: Initial Determination**

(a) Subject to the policy supervision of the council and the control of the chairperson of the Grievance Committee, the counsel, or other personnel under the authority of the counsel, will investigate the grievance and submit to the chairperson of the Grievance Committee a report detailing the findings of the investigation.

(b) As soon as practicable after the receipt of the initial or any interim report of the counsel concerning any grievance, the chairperson of the Grievance Committee may

(1) treat the report as a final report;

(2) direct the counsel to conduct further investigation, including contacting the respondent in writing or otherwise; or

(3) send a letter of notice to the respondent.

(c) If a letter of notice is sent to the respondent, it will be by certified mail and will direct that a response be made within 15 days of receipt of the letter of notice. Such response will be a full and fair disclosure of all

the facts and circumstances pertaining to the alleged misconduct. The counsel will provide the respondent with a copy of the grievance upon request, except where the complainant requests to remain anonymous pursuant to Rule .0111(d) of this subchapter.

(d) The counsel may provide a copy of the respondent's response(s) to the letter of notice to the complaining party unless the respondent objects thereto in writing.

(e) After a response to a letter of notice is received, the counsel may conduct further investigation or terminate the investigation, subject to the control of the chairperson of the Grievance Committee.

(f) For reasonable cause, the chairperson of the Grievance Committee may issue subpoenas to compel the attendance of witnesses, including the respondent, for examination concerning the grievance and may compel the production of books, papers, and other documents or writings deemed necessary or material to the inquiry. Each subpoena will be issued by the chairperson of the Grievance Committee, or by the secretary at the direction of the chairperson. The counsel, deputy counsel, investigator, or any members of the Grievance Committee designated by the chairperson may examine any such witness under oath or otherwise.

(g) As soon as practicable after the receipt of the final report of the counsel or the termination of an investigation, the chairperson will convene the Grievance Committee to consider the grievance.

(h) The investigation into the conduct of an attorney will not be abated by the failure of the complainant to sign a grievance, settlement or compromise with the complainant, or the payment of restitution to the complainant. The chair of the Grievance Committee may dismiss a grievance upon request of the complainant and with consent of counsel where it appears that there is no probable cause to believe that the respondent has violated the Rules of Professional Conduct.

(i) If at any time prior to a finding of probable cause, the chairperson of the Grievance Committee, upon the recommendation of the counsel or the Grievance Committee, determines that the alleged misconduct is primarily attributable to the respondent's failure to employ sound law office management techniques and procedures, the chairperson of the Grievance Committee may, with the respondent's consent, refer the case to the Board of Continuing Legal Education. The respondent will then be required to complete, under the supervision of the board, a course of training in law office management prescribed by the chairperson of the Grievance Committee which may include a comprehensive site audit of the respondent's records and procedures as well as continuing legal education seminars. Upon the respondent's successful completion of the prescribed training, the board will report the same to the chairperson of the Grievance Committee, who will order the dismissal of the grievance. If the respondent fails to cooperate with the board or fails to complete the prescribed training, that will be reported to the chairperson of the Grievance Committee and the investigation of the original grievance shall resume.

(j) No reference of a case pursuant to the procedure set forth in Rule .0112(h) above can be made unless the respondent expressly waives any right that he or she might otherwise have to confidential communications with persons acting under the supervision of the Board of Continuing Legal Education in regard to the prescribed course of training.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### **.0113 Proceedings Before the Grievance Committee**

(a) The Grievance Committee will determine whether there is probable cause to believe that a respondent is guilty of misconduct justifying disciplinary action. In its discretion, the Grievance Committee may find probable cause regardless of whether the respondent has been served with a written letter of notice. The respondent may waive the necessity of a finding of probable cause with the consent of the counsel and the chairperson of the Grievance Committee.

(b) The chairperson of the Grievance Committee will have the power to administer oaths and affirmations.

(c) The chairperson will keep a record of the Grievance Committee's determination concerning each grievance and file the record with the secretary.

(d) The chairperson will have the power to subpoena witnesses, to compel their attendance, and compel the production of books, papers, and other documents deemed necessary or material to any preliminary hearing. The chairperson may designate the secretary to issue such subpoenas.

(e) The counsel and deputy counsel, the witness under examination, interpreters when needed, and, if deemed necessary, a stenographer or operator of a recording device may be present while the committee is in session and deliberating, but no persons other than members may be present while the committee is voting.

(f) The results of any deliberation by the Grievance Committee will be disclosed to the counsel and the secretary for use in the performance of their duties. Otherwise, a member of the committee, the staff of the North Carolina State Bar, any interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the committee only when so directed by the committee or a court of record.

(g) At any preliminary hearing held by the Grievance Committee, a quorum of one-half of the members will be required to conduct any business. Affirmative vote of a majority of members present will be necessary to find that probable cause exists. The chairperson will not be counted for quorum purposes and will be eligible to vote regarding the disposition of any grievance only in case of a tie among the regular voting members.

(h) If probable cause is found and the committee determines that a hearing is necessary, the chairperson will direct the counsel to prepare and file a complaint against the defendant. If the committee finds probable cause but determines that no hearing is necessary, it will direct the counsel to prepare for the chairperson's signature an admonition, reprimand, or censure. If no probable cause is found, the grievance will be dismissed or dismissed with a letter of warning or a letter of caution.

(i) If no probable cause is found but it is determined by the Grievance Committee that the conduct of the respondent is unprofessional or not in accord with accepted professional practice, the committee may issue a letter of caution to the respondent recommending that the respondent be more professional in his or her practice in one or more ways which are to be specifically identified.

(j) Letters of warning

(1) If no probable cause is found but it is determined by the Grievance Committee that the conduct of the respondent is an unintentional, minor, or technical violation of the Rules of Professional Conduct, the committee may issue a letter of warning to the respondent. The letter of warning will advise the respondent that he or she may be subject to discipline if such conduct is continued or repeated. The letter will specify in one or more ways the conduct or practice for which the respondent is being warned. The letter of warning will not constitute discipline of the respondent.

(2) A copy of the letter of warning will be maintained in the office of the counsel for three years. If relevant, a copy of the letter of warning may be offered into evidence in any proceeding filed against the respondent before the commission within three years after the letter of warning is issued to the respondent. In every case filed against the respondent before the commission within three years after the letter of warning is issued to the respondent, the letter of warning may be introduced into evidence as an aggravating factor concerning the issue of what disciplinary sanction should be imposed. A copy of the letter of warning may be disclosed to the Grievance Committee if another grievance is filed against the respondent within three years after the letter of warning is issued to the respondent.

(3) A copy of the letter of warning will be served upon the respondent as provided in Rule 4 of the North Carolina Rules of Civil Procedure. Within 15 days after service the respondent may refuse the letter of warning and request a hearing before the commission to determine whether a violation of the Rules of Professional Conduct has occurred. Such refusal and request will be in writing, addressed to the Grievance Committee, and served on the secretary by certified mail, return receipt requested. The refusal will state that the letter of warning is refused. If a refusal and request are not served within 15 days after service upon the respondent of the letter of warning, the letter of warning will be deemed accepted by the respondent. An extension of time may be granted by the chairperson of the Grievance Committee for good cause shown.

(4) In cases in which the respondent refuses the letter of warning, the counsel will prepare and file a complaint against the respondent for a hearing pursuant to Rule .0114 of this subchapter.

(k) Admonitions and Reprimands

(1) If probable cause is found but it is determined by the Grievance Committee that a complaint and hearing are not warranted, the committee may issue an admonition or reprimand to the defendant, depending upon the seriousness of the violation of the Rules of Professional Conduct. A record of such admonition or reprimand will be maintained in the office of the secretary.

(2) A copy of the admonition or reprimand will be served upon the defendant as provided in Rule 4 of the North Carolina Rules of Civil Procedure.

(3) Within 15 days after service the defendant may refuse the admonition or reprimand and request a hearing before the commission. Such refusal and request will be in writing, addressed to the Grievance Committee, and served upon the secretary by certified mail, return receipt requested. The refusal will state that the admonition or reprimand is refused.

(4) In cases in which the defendant refuses an admonition or reprimand, the counsel will prepare and file a complaint against the defendant pursuant to Rule .0114 of this subchapter. If a refusal and request are not served upon the secretary within 15 days after service upon the defendant of the admonition or reprimand, the admonition or reprimand will be deemed accepted by the defendant. An extension of time may be granted by the chairperson of the Grievance Committee for good cause shown.

(l) Censures

(1) If probable cause is found and the Grievance Committee determines that the defendant has violated one or more provisions of the Rules of Professional Conduct and has caused significant harm or significant potential harm to a client, the administration of justice, the profession, or a member of the public, but the misconduct does not require suspension of the defendant's license, the committee will issue a notice of proposed censure and a proposed censure to the defendant.

(2) A copy of the notice and the proposed censure will be served upon the defendant as provided in Rule 4 of the North Carolina Rules of Civil Procedure. The defendant must be advised that he or she may accept the censure within 15 days after service upon him or her or a formal complaint will be filed before the commission.

(3) The defendant's acceptance must be in writing, addressed to the Grievance Committee, and served on the secretary by certified mail, return receipt requested. Once the censure is accepted by the defendant, the discipline becomes public and must be filed as provided by Rule .0123(a)(3) of this subchapter.

(4) If the defendant does not accept the censure, the counsel will file a complaint against the defendant pursuant to Rule .0114 of this subchapter.

(m) Formal complaints will be issued in the name of the North Carolina State Bar as plaintiff and signed by the chairperson of the Grievance

Committee. Amendments to complaints may be signed by the counsel alone, with the approval of the chairperson of the Grievance Committee.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28

Readopted Effective December 8, 1994

#### **.0114 Formal Hearing**

(a) Complaints will be filed with the secretary. The secretary will cause a summons and a copy of the complaint to be served upon the defendant and thereafter a copy of the complaint will be delivered to the chairperson of the commission, informing the chairperson of the date service on the defendant was effected.

(b) Service of complaints and other documents or papers will be accomplished as set forth in Rule 4 of the North Carolina Rules of Civil Procedure.

(c) Complaints in disciplinary actions will allege the charges with sufficient precision to clearly apprise the defendant of the conduct which is the subject of the complaint.

(d) Within 14 days of the receipt of return of service of a complaint by the secretary, the chairperson of the commission will designate a hearing committee from among the commission members. The chairperson will notify the counsel and the defendant of the composition of the hearing committee. Such notice will also contain the time and place determined by the chairperson for the hearing to commence. The commencement of the hearing will be initially scheduled not less than 60 nor more than 90 days from the date of service of the complaint upon the defendant, unless one or more subsequent complaints have been served on the defendant within 90 days from the date of service of the first or a preceding complaint. When one or more subsequent complaints have been served on the defendant within 90 days from the date of service of the first or a preceding complaint, the chairperson of the commission may consolidate the cases for hearing, and the hearing will be initially scheduled not less than 60 nor more than 90 days from the date of service of the last complaint upon the defendant.

(e) Within 20 days after the service of the complaint, unless further time is allowed by the chairperson of the hearing committee upon good cause shown, the defendant will file an answer to the complaint with the secretary and will serve a copy on the counsel.

(f) Failure to file an answer admitting, denying or explaining the complaint or asserting the grounds for failing to do so, within the time limited or extended, will be grounds for entry of the defendant's default and in such case the allegations contained in the complaint will be deemed admitted. The secretary will enter the defendant's default when the fact of default is made to appear by motion of the counsel or otherwise. The counsel may thereupon apply to the hearing committee for a default order imposing discipline, and the hearing committee will thereupon enter an order, make findings of fact and conclusions of law based on the admissions, and order the discipline deemed appropriate. The hearing committee may, in its discretion, hear such additional evidence as it deems necessary prior to entering the order of discipline. For good cause shown, the hearing committee may set aside the secretary's entry of default. After an order imposing discipline has been entered by the hearing committee upon the defendant's default, the hearing committee may set aside the order in accordance with Rule 60(b) of the North Carolina Rules of Civil Procedure.

(g) Discovery will be available to the parties in accordance with the North Carolina Rules of Civil Procedure. Any discovery undertaken must be completed before the date scheduled for commencement of the hearing unless the time for discovery is extended for good cause shown by the chairperson of the hearing committee. The chairperson of the hearing committee may thereupon reset the time for the hearing to commence to accommodate completion of reasonable discovery.

(h) The parties may meet by mutual consent prior to the hearing on the complaint to discuss the possibility of settlement of the case or the stipulation of any issues, facts, or matters of law. Any proposed settlement of

the case will be subject to the approval of the hearing committee. If the committee rejects a proposed settlement, another hearing committee must be empaneled to try the case, unless all parties consent to proceed with the original committee. The parties may submit a proposed settlement to a second hearing committee, but the parties shall not have the right to request a third hearing committee if the settlement order is rejected by the second hearing committee. The second hearing committee shall either accept the settlement proposal or hear the disciplinary matter.

(i) At the discretion of the chairperson of the hearing committee, a conference may be ordered before the date set for commencement of the hearing, and upon five days' notice to the parties, for the purpose of obtaining admissions or otherwise narrowing the issues presented by the pleadings. Such conference may be held before any member of the committee designated by its chairperson. At any conference which may be held to expedite the orderly conduct and disposition of any hearing, there may be considered, in addition to any offers of settlement or proposals of adjustment, the possibility of the following:

- (1) the simplification of the issues;
- (2) the exchange of exhibits proposed to be offered in evidence;
- (3) the stipulation of facts not remaining in dispute or the authenticity of documents;
- (4) the limitation of the number of witnesses;
- (5) the discovery or production of data;
- (6) such other matters as may properly be dealt with to aid in expediting the orderly conduct and disposition of the proceeding.

(j) The chairperson of the hearing committee, without consulting the other committee members, may hear and dispose of all pretrial motions except motions the granting of which would result in dismissal of the charges or final judgment for either party. All motions which could result in dismissal of the charges or final judgment for either party will be decided by a majority of the members of the hearing committee. Any pretrial motion may be decided on the basis of the parties' written submissions. Oral argument may be allowed in the discretion of the chairperson of the hearing committee.

(k) The initial hearing date as set by the chairperson in accordance with Rule .0114(d) above may be reset by the chairperson, and said initial hearing or reset hearing may be continued by the chairperson of the hearing committee for good cause shown.

(l) After a hearing has commenced, no continuances other than an adjournment from day to day will be granted, except to await the filing of a controlling decision of an appellate court, by consent of all parties, or where extreme hardship would result in the absence of a continuance.

(m) The defendant will appear in person before the hearing committee at the time and place named by the chairperson. The hearing will be open to the public except that for good cause shown the chairperson of the hearing committee may exclude from the hearing room all persons except the parties, counsel, and those engaged in the hearing. No hearing will be closed to the public over the objection of the defendant. The defendant will, except as otherwise provided by law, be competent and compellable to give evidence for either of the parties. The defendant may be represented by counsel, who will enter an appearance.

(n) Pleadings and proceedings before a hearing committee will conform as nearly as practicable with requirements of the North Carolina Rules of Civil Procedure and for trials of nonjury civil causes in the superior courts except as otherwise provided herein.

(o) Pleadings or other documents in formal proceedings required or permitted to be filed under these rules must be received for filing by the secretary within the time limits, if any, for such filing. The date of receipt by the secretary, and not the date of deposit in the mails, is determinative.

(p) All papers presented to the commission for filing will be on letter size paper (8 1/2 x 11 inches) with the exception of exhibits. The secretary will require a party to refile any paper that does not conform to this size.

(q) When a defendant appears in his or her own behalf in a proceeding, the defendant will file with the secretary, with proof of delivery of a copy to the counsel, an address at which any notice or other written communication required to be served upon the defendant may be sent, if such address differs from that last reported to the secretary by the defendant.

(r) When a defendant is represented by counsel in a proceeding, counsel will file with the secretary, with proof of delivery of a copy to the counsel, a written notice of such appearance which will state his or her name, address and telephone number, the name and address of the defendant on whose behalf he or she appears, and the caption and docket number of the proceeding. Any additional notice or other written communication required to be served on or furnished to a defendant during the pendency of the hearing may be sent to the counsel of record for such defendant at the stated address of the counsel in lieu of transmission to the defendant.

(s) The hearing committee will have the power to subpoena witnesses and compel their attendance, and to compel the production of books, papers, and other documents deemed necessary or material to any hearing. Such process will be issued in the name of the committee by its chairperson, or the chairperson may designate the secretary of the North Carolina State Bar to issue such process. Both parties have the right to invoke the powers of the committee with respect to compulsory process for witnesses and for the production of books, papers, and other writings and documents.

(t) In any hearing admissibility of evidence will be governed by the rules of evidence applicable in the superior court of the state at the time of the hearing. The chairperson of the hearing committee will rule on the admissibility of evidence, subject to the right of any member of the hearing committee to question the ruling. If a member of the hearing committee challenges a ruling relating to admissibility of evidence, the question will be decided by majority vote of the hearing committee.

(u) If the hearing committee finds that the charges of misconduct are not established by clear, cogent, and convincing evidence, it will enter an order dismissing the complaint. If the hearing committee finds that the charges of misconduct are established by clear, cogent, and convincing evidence, the hearing committee will enter an order of discipline. In either instance, the committee will file an order which will include the committee's findings of fact and conclusions of law.

(v) The secretary will ensure that a complete record is made of the evidence received during the course of all hearings before the commission as provided by G.S. 7A-95 for trials in the superior court. The secretary will preserve the record and the pleadings, exhibits, and briefs of the parties.

(w) If the charges of misconduct are established, the hearing committee will then consider any evidence relevant to the discipline to be imposed, including the record of all previous misconduct for which the defendant has been disciplined in this state or any other jurisdiction and any evidence in aggravation or mitigation of the offense.

(1) The hearing committee may consider aggravating factors in imposing discipline in any disciplinary case, including the following factors:

- (A) prior disciplinary offenses;
- (B) dishonest or selfish motive;
- (C) a pattern of misconduct;
- (D) multiple offenses;
- (E) bad faith obstruction of the disciplinary proceedings by intentionally failing to comply with rules or orders of the disciplinary agency;
- (F) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
- (G) refusal to acknowledge wrongful nature of conduct;
- (H) vulnerability of victim;
- (I) substantial experience in the practice of law;

(J) indifference to making restitution;

(K) issuance of a letter of warning to the defendant within the three years immediately preceding the filing of the complaint.

(2) The hearing committee may consider mitigating factors in imposing discipline in any disciplinary case, including the following factors:

- (A) absence of a prior disciplinary record;
- (B) absence of a dishonest or selfish motive;
- (C) personal or emotional problems;
- (D) timely good faith efforts to make restitution or to rectify consequences of misconduct;
- (E) full and free disclosure to the hearing committee or cooperative attitude toward proceedings;
- (F) inexperience in the practice of law;
- (G) character or reputation;
- (H) physical or mental disability or impairment;
- (I) delay in disciplinary proceedings through no fault of the defendant attorney;
- (J) interim rehabilitation;
- (K) imposition of other penalties or sanctions;
- (L) remorse;
- (M) remoteness of prior offenses.

(x) In any case in which a period of suspension is stayed upon compliance by the defendant with conditions, the commission will retain jurisdiction of the matter until all conditions are satisfied. If, during the period the stay is in effect, the counsel receives information tending to show that a condition has been violated, the counsel may, with the consent of the chairperson of the Grievance Committee, file a motion in the cause with the secretary specifying the violation and seeking an order requiring the defendant to show cause why the stay should not be lifted and the suspension activated for violation of the condition. The counsel will also serve a copy of any such motion upon the defendant. The secretary will promptly transmit the motion to the chairperson of the commission who, if he or she enters an order to show cause, will appoint a hearing committee as provided in Rule .0108(a)(2) of this subchapter, appointing the members of the hearing committee that originally heard the matter wherever practicable. The chairperson of the commission will also schedule a time and a place for a hearing and notify the counsel and the defendant of the composition of the hearing committee and the time and place for the hearing. After such a hearing, the hearing committee may enter an order lifting the stay and activating the suspension, or any portion thereof, and taxing the defendant with the costs, if it finds that the North Carolina State Bar has proven, by the greater weight of the evidence, that the defendant has violated a condition. If the hearing committee finds that the North Carolina State Bar has not carried its burden, then it will enter an order continuing the stay. In any event, the hearing committee will include in its order findings of fact and conclusions of law in support of its decision.

(y) All reports and orders of the hearing committee will be signed by the members of the committee, or by the chairperson of the committee on behalf of the committee, and will be filed with the secretary. The copy to the defendant will be served by certified mail, return receipt requested. If the defendant's copy is returned as unclaimed or undeliverable, then service will be as provided in Rule 4 of the North Carolina Rules of Civil Procedure.

(z) Posttrial Motions

(1) Consent Orders After Trial - At any time after a disciplinary hearing and prior to the execution of the committee's final order pursuant to Rule .0114(y) above, the committee may, with the consent of the parties, amend its decision regarding the findings of fact, conclusions of law, or the disciplinary sanction imposed.

(2) New Trials and Amendment of Judgments

(A) As provided in Rule .0114(z)(2)(B) below, following a disciplinary hearing before the commission, either party may request a new trial or amendment of the hearing committee's final order, based on any of the grounds set out in Rule 59 of the North Carolina Rules of Civil Procedure.

(B) A motion for a new trial or amendment of judgment will be served, in writing, on the chairperson of the hearing committee which heard the disciplinary case no later than 20 days after service of the final order of discipline upon the defendant. Supporting affidavits, if any, and a memorandum setting forth the basis of the motion together with supporting authorities, will be filed with the motion.

(C) The opposing party will have 20 days from service of the motion to file a written response, any reply affidavits, and a memorandum with supporting authorities.

(D) The hearing committee may rule on the motion based on the parties' written submissions or may, in its discretion, permit the parties to present oral argument.

### (3) Relief from Judgment or Order

(A) Following a disciplinary proceeding before the commission, either party may file a motion for relief from the final judgment or order, based on any of the grounds set out in Rule 60 of the North Carolina Rules of Civil Procedure.

(B) Motions made under Rule .0114(z)(2)(B) above will be made no later than one year after the effective date of the order from which relief is sought. Motions pursuant to this section will be heard and decided in the same manner as motions submitted pursuant to Rule .0114(z)(2) above.

(4) Effect of Filing Motion - The filing of a motion under Rule .0114(z)(2) above or Rule .0114(z)(3) above will not automatically stay or otherwise affect the effective date of an order of the commission.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28; G.S. 84-28.1; G.S. 84-29; G.S. 84-30; G.S. 84-32(a)

Readopted Effective December 8, 1994

### .0115 Effect of a Finding of Guilt in Any Criminal Case

(a) Any member convicted of or sentenced for the commission of a serious crime in any state or federal court, whether such a conviction or judgment results from a plea of guilty, no contest, or nolo contendere or from a verdict after trial, will, upon the conviction or judgment becoming final by affirmation on appeal or failure to perfect an appeal within the time allowed, be suspended from the practice of law as set out in Rule .0115(d) below.

(b) A certificate of the conviction of an attorney for any crime or a certificate of the judgment entered against an attorney where a plea of nolo contendere or no contest has been accepted by a court will be conclusive evidence of guilt of that crime in any disciplinary proceeding instituted against a member.

(c) Upon the receipt of a certificate of the conviction of a member of a serious crime or a certificate of the judgment entered against an attorney where a plea of nolo contendere or no contest has been accepted by a court, the Grievance Committee, at its next meeting following notification of the conviction, will authorize the filing of a complaint if one is not pending. In the hearing on such complaint, the sole issue to be determined will be the extent of the discipline to be imposed. No hearing based solely upon a certificate of conviction will commence until all appeals from the conviction are concluded.

(d) Upon the receipt of a certificate of conviction of a member of a serious crime or a certificate of the judgment entered against an attorney where a plea of nolo contendere or no contest has been accepted by a court, the commission chairperson will enter an order suspending the member pending the disposition of the disciplinary proceeding against

the member before the commission. The provisions of Rule .0124(c) of this subchapter will apply to the suspension.

(e) Upon the receipt of a certificate of conviction of a member or a certificate of the judgment entered against an attorney where a plea of nolo contendere or no contest has been accepted by a court for a crime not constituting a serious crime, the Grievance Committee will take whatever action, including the filing of a complaint, it may deem appropriate.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28

Readopted Effective December 8, 1994

### .0116 Reciprocal Discipline

(a) All members who have been disciplined in any state or federal court for professional misconduct will inform the secretary of such action in writing no later than 30 days after entry of the order of discipline.

(b) Except as provided in subsection (c) below, reciprocal discipline will be administered as follows:

(1) Upon receipt of a certified copy of an order demonstrating that a member has been disciplined in another jurisdiction, state or federal, the Grievance Committee will forthwith issue a notice directed to the member containing a copy of the order from the other jurisdiction and an order directing that the member inform the committee within 30 days from service of the notice of any claim by the member that the imposition of the identical discipline in this state would be unwarranted and the reasons therefor. This notice is to be served on the member in accordance with the provisions of Rule 4 of the North Carolina Rules of Civil Procedure.

(2) In the event the discipline imposed in the other jurisdiction has been stayed, any reciprocal discipline imposed in this state will be deferred until such stay expires.

(3) Upon the expiration of 30 days from service of the notice issued pursuant to the provisions of Rule .0116(b)(1) above, the chairperson of the Grievance Committee will impose the identical discipline unless the member demonstrates

(A) that the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process;

(B) there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Grievance Committee could not, consistent with its duty, accept as final the conclusion on that subject; or

(C) that the imposition of the same discipline would result in grave injustice.

(4) Where the Grievance Committee determines that any of the elements listed in Rule .0116(b)(3) above exist, the committee will dismiss the case or direct that a complaint be filed.

(5) In the event the elements listed in Rule .0116(b)(3) above are found not to exist, a final adjudication in another jurisdiction that an attorney has been guilty of misconduct will establish the misconduct for purposes of reciprocal discipline.

(c) Reciprocal discipline with certain federal courts will be administered as follows:

(1) Upon receipt of a certified copy of an order demonstrating that a member has been disciplined in a United States District Court in North Carolina, in the United States Fourth Circuit Court of Appeals, or in the United States Supreme Court, the chairperson of the Grievance Committee will forthwith issue a notice directed to the member. The notice will contain a copy of the order from the court and an order directing the member to inform the committee within 10 days from service of the notice whether the member will accept reciprocal discipline which is substantially similar to that imposed by the federal court. This notice is to be served on the member in accordance with the provisions of Rule 4 of the North Carolina Rules of Civil Procedure. The member will have 30 days from service of the notice to file a written challenge with the committee on the grounds that the imposition of discipline by the North Carolina State Bar would be unwar-

ranted because the facts found in the federal disciplinary proceeding do not involve conduct which violates the North Carolina Rules of Professional Conduct. If the member notifies the North Carolina State Bar within 10 days after service of the notice that he or she accepts reciprocal discipline which is substantially similar to that imposed by the federal court, substantially similar discipline will be ordered as provided in Rule .0116(c)(2) below and will run concurrently with the discipline ordered by the federal court.

(2) If the member notifies the North Carolina State Bar of his or her acceptance of reciprocal discipline as provided in Rule .0116(c)(1) above the chairperson of the Grievance Committee will execute an order of discipline which is of a type permitted by these rules and which is substantially similar to that ordered by the federal court and will cause said order to be served upon the member.

(3) If the discipline imposed by the federal court has been stayed, any reciprocal discipline imposed by the North Carolina State Bar will be deferred until such stay expires.

(4) Upon the expiration of 30 days from service of the notice issued pursuant to the provisions of Rule .0116(c)(1) above, the chairperson of the Grievance Committee will enter an order of reciprocal discipline imposing substantially similar discipline of a type permitted by these rules to be effective throughout North Carolina unless the member requests a hearing before the Grievance Committee and at such hearing

(A) the member demonstrates that the facts found in the federal disciplinary proceeding did not involve conduct which violates the North Carolina Rules of Professional Conduct, in which event the case will be dismissed; or

(B) the Grievance Committee determines that the discipline imposed by the federal court is not of a type described in Rule .0123(a) of this subchapter and, therefore, cannot be imposed by the North Carolina State Bar, in which event the Grievance Committee may dismiss the case or direct that a complaint be filed in the commission.

(5) All findings of fact in the federal disciplinary proceeding will be binding upon the North Carolina State Bar and the member.

(6) Discipline imposed by any other federal court will be administered as provided in Rule .0116(b) above.

(d) If the member fails to accept reciprocal discipline as provided in Rule .0116(c) above or if a hearing is held before the Grievance Committee under either Rule .0116(b) above or Rule .0116(c) above and the committee orders the imposition of reciprocal discipline, such discipline will run from the date of service of the final order of the chairperson of the Grievance Committee unless the committee expressly provides otherwise.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28

Readopted Effective December 8, 1994

### **.0117 Surrender of License While Under Investigation**

(a) A member who is the subject of an investigation into allegations of misconduct, but against whom no formal complaint has been filed before the commission may tender his or her license to practice by delivering to the secretary for transmittal to the council an affidavit stating that the member desires to resign and that

(1) the resignation is freely and voluntarily rendered, is not the result of coercion or duress, and the member is fully aware of the implications of submitting the resignation;

(2) the member is aware that there is presently pending an investigation or other proceedings regarding allegations that the member has been guilty of misconduct, the nature of which will specifically be set forth;

(3) the member acknowledges that the material facts upon which the grievance is predicated are true;

(4) the resignation is being submitted because the member knows that if charges were predicated upon the misconduct under investigation, the member could not successfully defend against them.

(b) The council may accept a member's resignation only if the affidavit required under Rule .0117(a) above satisfies the requirements stated therein and the member has provided to the North Carolina State Bar all documents and financial records required to be kept pursuant to the Rules of Professional Conduct and requested by the council. If the council accepts a member's resignation, it will enter an order disbarring the member. The order of disbarment is effective on the date the council accepts the member's resignation.

(c) The order disbarring the member and the affidavit required under Rule .0117(a) above are matters of public record.

(d) If a defendant against whom a formal complaint has been filed wishes to consent to disbarment, the defendant may do so by filing an affidavit with the chairperson of the commission. If the chairperson determines that the affidavit meets the requirements set out above, the chairperson will accept the surrender and issue an order of disbarment. The order of disbarment becomes effective 30 days after service of the order upon the defendant. If the affidavit does not meet the requirements set out above, the consent to disbarment will not be accepted and the disciplinary complaint will be heard pursuant to Rule .0114 of this subchapter.

(e) After a member tenders his or her license or consents to disbarment under this section the member may not undertake any new legal matters. The member may complete any legal matters which were pending on the date of the tender of the affidavit or consent to disbarment which can be completed within 30 days. The member has 30 days from the date on which the member tenders the affidavit of surrender or consent to disbarment in which to comply with all of the duties set out in Rule .0124 of this subchapter.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28; G.S. 84-32(b)

Readopted Effective December 8, 1994

### **.0118 Disability Hearings**

(a) Disability Proceedings

Where Member Involuntarily Committed or Judicially Declared Incompetent

Where a member of the North Carolina State Bar has been judicially declared incapacitated or mentally ill under the provisions of Chapter 122C of the General Statutes or similar laws of any jurisdiction, the secretary, upon proper proof of the fact, will enter an order transferring the member to disability inactive status effective immediately and for an indefinite period until further order of the commission. A copy of the order will be served upon the member, the member's guardian, or the director of the institution to which the member has been committed.

(b) Disability Proceedings Initiated by the North Carolina State Bar

(1) When the North Carolina State Bar obtains evidence that a member has become disabled, the Grievance Committee will conduct a hearing in a manner that will conform as nearly as is possible to the procedures set forth in Rule .0113 of this subchapter. The Grievance Committee will determine whether there is probable cause to believe that the member is disabled within the meaning of Rule .0103(18) of this subchapter. If the committee finds probable cause, a petition alleging disability will be filed in the name of the North Carolina State Bar by the counsel and signed by the chairperson of the Grievance Committee.

(2) Whenever the counsel files a petition alleging the disability of a member, the chairperson of the commission will appoint a hearing committee as provided in Rule .0108(a)(2) of this subchapter to determine whether such member is disabled. The hearing committee will conduct a hearing on the petition in the same manner as a disciplinary

proceeding under Rule .0114 of this subchapter. The hearing will be open to the public.

(3) The hearing committee may require the member to undergo psychiatric, physical, or other medical examination or testing by qualified medical experts selected by the hearing committee.

(4) In any proceeding seeking a transfer to disability inactive status under this rule, the North Carolina State Bar will have the burden of proving by clear, cogent, and convincing evidence that the member is disabled within the meaning of Rule .0103(18) of this subchapter.

(5) The hearing committee may appoint an attorney to represent the member in a disability proceeding, if the hearing committee concludes that justice so requires.

(6) If the hearing committee finds that the member is disabled, the committee will enter an order transferring the member to disability inactive status. The order of transfer will become effective immediately. A copy of the order will be served upon the member or the member's guardian or attorney.

**(c) Disability Proceedings Where Defendant Alleges Disability in Disciplinary Proceeding**

(1) If, during the course of a disciplinary proceeding, the defendant contends that he or she is disabled within the meaning of Rule .0103(18) of this subchapter, the disciplinary proceeding will be stayed pending a determination by the hearing committee whether such disability exists. The defendant will be immediately transferred to disability inactive status pending the conclusion of the disability hearing.

(2) The hearing committee scheduled to hear the disciplinary charges will hold the disability proceeding. The hearing will be conducted pursuant to the procedures outlined in Rule .0118(b)(3) and (5)-(6) above.

(3) The defendant will have the burden of proving by clear, cogent, and convincing evidence that he or she is disabled within the meaning of Rule .0103(18) of this subchapter. If the hearing committee concludes that the defendant is disabled, the disciplinary proceedings will be stayed as long as the defendant remains in disability inactive status.

(4) If the hearing committee determines that the defendant is not disabled, the chairperson of the hearing committee will set a date for resumption of the disciplinary proceeding.

**(d) Disability Hearings Initiated by a Hearing Committee**

(1) If, during the pendency of a disciplinary proceeding a majority of the members of the hearing committee find reason to believe that the defendant is disabled, the committee will enter an order staying the disciplinary proceeding until the question of disability can be determined by the committee in accordance with the procedures set out in Rules .0118(b)(2)-(6) above. The State Bar will have the burden of proving by clear, cogent, and convincing evidence that the defendant is disabled within the meaning of Rule .0103(18) of this subchapter.

(2) If the hearing committee determines that the defendant is not disabled, the chairperson of the hearing committee will set a date for resumption of the disciplinary proceeding.

(3) If the hearing committee determines that the defendant is disabled, the disciplinary proceeding will be stayed as long as the defendant remains in disability inactive status. If the defendant is returned to active status by the commission, the disciplinary proceeding will be rescheduled by the chairperson of the commission.

**(e) Fees and Costs**

The hearing committee may direct the member to pay the costs of the disability proceeding, including the cost of any medical examination and the fees of any attorney appointed to represent the member.

**(f) Preservation of Evidence**

In any case in which disciplinary proceedings against a defendant have been stayed by reason of the defendant's disability, counsel may con-

tinue to investigate allegations of misconduct and may seek orders from the chairperson of the commission to preserve evidence of any alleged professional misconduct by the disabled defendant, including orders which permit the taking of depositions. The chairperson may order appointment of counsel to represent the disabled defendant when necessary to protect the interests of the disabled defendant.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28(g); G.S. 84-28.1; G.S. 84-29; G.S. 84-30

Readopted Effective December 8, 1994

**.0119 Enforcement of Powers**

In addition to the other powers contained herein, in proceedings before any committee or subcommittee of the Grievance Committee or the commission, if any person refuses to respond to a subpoena, refuses to take the oath or affirmation as a witness or thereafter refuses to be examined, refuses to obey any order in aid of discovery, or refuses to obey any lawful order of the committee contained in its decision rendered after hearing, the counsel or secretary may apply to the appropriate court for an order directing that person to comply by taking the requisite action.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28(i)

Readopted Effective December 8, 1994

**.0120 Notice to Member of Action and Dismissal**

In every disciplinary case wherein the respondent has received a letter of notice and the grievance has been dismissed, the respondent will be notified of the dismissal by a letter by the chairperson of the Grievance Committee. The chairperson will have discretion to give similar notice to the respondent in cases wherein a letter of notice has not been issued but the chairperson deems such notice to be appropriate.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**.0121 Notice to Complainant**

(a) If the Grievance Committee finds probable cause and imposes discipline, the chairperson of the Grievance Committee will notify the complainant of the action of the committee.

(b) If the Grievance Committee finds probable cause and refers the matter to the commission, the chairperson of the Grievance Committee will advise the complainant that the grievance has been received and considered and has been referred to the commission for hearing.

(c) If final action on a grievance is taken by the Grievance Committee in the form of a letter of caution or letter of warning or is dismissed, the chairperson of the Grievance Committee will advise the complainant that following its deliberations, the committee did not find probable cause to justify imposing discipline and dismissed the grievance.

(d) If a grievance is referred to the Board of Continuing Legal Education, the chairperson of the Grievance Committee will advise the complainant of that fact and the reason for the referral. If the respondent successfully completes the prescribed training and the grievance is dismissed, the chairperson of the Grievance Committee will advise the complainant. If the respondent does not successfully complete the prescribed course of training, the chairperson of the Grievance Committee will advise the complainant that investigation of the original grievance has resumed.

History Note: Statutory Authority G.S. 84-23; Readopted Effective December 8, 1994

**.0122 Appointment of Counsel to Protect Clients' Interests When Attorney Disappears, Dies, or Is Transferred to Disability Inactive Status**

(a) Whenever a member of the North Carolina State Bar has been transferred to disability inactive status, disappears, or dies and no partner or other member of the North Carolina State Bar capable of protecting the interests of the attorney's clients is known to exist, the senior resident judge of the superior court in the district of the member's most recent address on file with the North Carolina State Bar, if it is in this state, will

be requested by the secretary to appoint an attorney or attorneys to inventory the files of the member and to take action to protect the interests of the member and his or her clients.

(b) Any member so appointed will not be permitted to disclose any information contained in any files inventoried without the consent of the client to whom such files relate except as necessary to carry out the order of the court which appointed the attorney to make such inventory.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28(j)

Readopted Effective December 8, 1994

### **.0123 Imposition of Discipline; Findings of Incapacity or Disability; Notice to Courts**

(a) Upon the final determination of a disciplinary proceeding wherein discipline is imposed, one of the following actions will be taken:

(1) Admonition - An admonition will be prepared by the chairperson of the Grievance Committee or the chairperson of the hearing committee depending upon the agency ordering the admonition. The admonition will be served upon the defendant. The admonition will not be recorded in the judgment docket of the North Carolina State Bar. Where the admonition is imposed by the Grievance Committee, the complainant will be notified that the defendant has been admonished, but will not be entitled to a copy of the admonition. An order of admonition imposed by the commission will be a public document.

(2) Reprimand - The chairperson of the Grievance Committee or chairperson of the hearing committee depending upon the body ordering the discipline, will file an order of reprimand with the secretary, who will record the order on the judgment docket of the North Carolina State Bar and will forward a copy to the complainant.

(3) Censure, suspension, or disbarment - The chairperson of the hearing committee will file the order of censure, suspension, or disbarment with the secretary, who will record the order on the judgment docket of the North Carolina State Bar and will forward a copy to the complainant. The secretary will also cause a certified copy of the order to be entered upon the judgment docket of the superior court of the county of the defendant's last known address. A copy of the order of censure, suspension, or disbarment will also be sent to the clerk of the superior court in any county where the defendant maintains an office, to the North Carolina Court of Appeals, to the North Carolina Supreme Court, to the United States District Courts in North Carolina, to the Fourth Circuit Court of Appeals, and to the United States Supreme Court. Orders of censure imposed by the Grievance Committee will be filed by the committee chairperson with the secretary. Notice of the censure will be given to the complainant and to the courts in the same manner as orders of censure imposed by the commission.

(b) Upon the final determination of incapacity or disability, the chairperson of the hearing committee or the secretary, depending upon the agency entering the order, will file with the secretary a copy of the order transferring the member to disability inactive status. The secretary will cause a certified copy of the order to be entered upon the judgment docket of the superior court of the county of the disabled member's last address on file with the North Carolina State Bar and will forward a copy of the order to the courts referred to in Rule .0123(a)(3) above.

History Note: Statutory Authority G.S. 84-23; G.S. 84-32(a)

Readopted Effective December 8, 1994

### **.0124 Obligations of Disbarred or Suspended Attorneys**

(a) A disbarred or suspended member of the North Carolina State Bar will promptly notify by certified mail, return receipt requested, all clients being represented in pending matters of the disbarment or suspension, the reasons for the disbarment or suspension, and consequent inability of the member to act as an attorney after the effective date of disbarment or suspension and will advise such clients to seek legal advice elsewhere. The disbarred or suspended attorney will take reasonable steps to avoid foreseeable prejudice to the rights of his or her clients, including

promptly delivering all file materials and property to which the clients are entitled to the clients or the clients' substituted attorney. No disbarred or suspended attorney will transfer active client files containing confidential information or property to another attorney, nor may another attorney receive such files or property, without prior written permission from the client.

(b) The disbarred or suspended member will withdraw from all pending administrative or litigation matters before the effective date of the suspension or disbarment and will follow all applicable laws and disciplinary rules regarding the manner of withdrawal.

(c) In cases not governed by Rule .0117 of this subchapter, orders imposing suspension or disbarment will be effective 30 days after being served upon the defendant. In such cases, after entry of the disbarment or suspension order, the disbarred or suspended attorney will not accept any new retainer or engage as attorney for another in any new case or legal matter of any nature. However, between the entry date of the order and its effective date, the member may complete, on behalf of any client, matters which were pending on the entry date and which can be completed before the effective date of the order.

(d) Within 10 days after the effective date of the disbarment or suspension order, the disbarred or suspended attorney will file with the secretary an affidavit showing that he or she has fully complied with the provisions of the order, with the provisions of this section, and with the provisions of all other state, federal, and administrative jurisdictions to which he or she is admitted to practice. The affidavit will also set forth the residence or other address of the disbarred or suspended member to which communications may thereafter be directed.

(e) The disbarred or suspended member will keep and maintain records of the various steps taken under this section so that, upon any subsequent proceeding, proof of compliance with this section and with the disbarment or suspension order will be available. Proof of compliance with this section will be a condition precedent to consideration of any petition for reinstatement.

(f) A suspended or disbarred attorney who fails to comply with Rules .0124(a)-(e) above may be subject to an action for contempt instituted by the appropriate authority. Failure to comply with the requirements of Rule .0124(a) above will be grounds for appointment of counsel pursuant to Rule .0122 of this subchapter.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.0125 Reinstatement**

#### **(a) After disbarment**

(1) No person who has been disbarred may have his or her license restored but upon order of the council after the filing of a verified petition for reinstatement and the holding of a hearing before a hearing committee as provided herein. No such hearing will commence until security for the costs of such hearing has been deposited with the secretary in an amount not to exceed \$500.00.

(2) No disbarred attorney may petition for reinstatement until the expiration of at least five years from the effective date of the disbarment.

(3) The petitioner will have the burden of proving by clear, cogent, and convincing evidence that

(A) not more than six months or less than 60 days before filing the petition for reinstatement, a notice of intent to seek reinstatement has been published by the petitioner in an official publication of the North Carolina State Bar. The notice will inform members of the Bar about the application for reinstatement and will request that all interested individuals file notice of their opposition or concurrence with the secretary within 60 days after the date of publication;

(B) not more than six months or less than 60 days before filing the petition for reinstatement, the petitioner has notified the com-

plainant(s) in the disciplinary proceeding which led to the lawyer's disbarment of the notice of intent to seek reinstatement. The notice will specify that each complainant has 60 days from the date of publication in which to raise objections or support the lawyer's petition;

(C) the petitioner has reformed and presently possesses the moral qualifications required for admission to practice law in this state taking into account the gravity of the misconduct which resulted in the order of disbarment;

(D) permitting the petitioner to resume the practice of law within the state will not be detrimental to the integrity and standing of the bar, to the administration of justice, or to the public interest, taking into account the gravity of the misconduct which resulted in the order of disbarment;

(E) the petitioner's citizenship has been restored if the petitioner has been convicted of or sentenced for the commission of a felony;

(F) the petitioner has complied with Rule .0124 of this subchapter;

(G) the petitioner has complied with all applicable orders of the commission and the council;

(H) the petitioner has complied with the orders and judgments of any court relating to the matters resulting in the disbarment;

(I) the petitioner has not engaged in the unauthorized practice of law during the period of disbarment;

(J) the petitioner has not engaged in any conduct during the period of disbarment constituting grounds for discipline under G.S. 84-28(b);

(K) the petitioner understands the current Rules of Professional Conduct. Participation in continuing legal education programs in ethics and professional responsibility for each of the three years preceding the petition date may be considered on the issue of the petitioner's understanding of the Rules of Professional Conduct. Such evidence creates no presumption that the petitioner has met the burden of proof established by this section;

(L) the petitioner has reimbursed the Client Security Fund of the North Carolina State Bar for all sums, including costs other than overhead expenses, disbursed by the Client Security Fund as a result of the petitioner's misconduct. This section shall not be deemed to permit the petitioner to collaterally attack the decision of the Client Security Fund Board of Trustees regarding whether to reimburse losses occasioned by the misconduct of the petitioner. This provision shall apply to petitions for reinstatement submitted by attorneys who were disciplined after the effective date of this amendment;

(M) the petitioner has reimbursed all sums which the Disciplinary Hearing Commission found in the order of disbarment were misappropriated by the petitioner and which have not been reimbursed by the Client Security Fund.

(4) Petitions filed less than seven years after disbarment

(A) If less than seven years have elapsed between the effective date of the disbarment and the filing date of the petition for reinstatement, the petitioner will also have the burden of proving by clear, cogent, and convincing evidence that the petitioner has the competency and learning in the law required to practice law in this state.

(B) Factors which may be considered in deciding the issue of competency include

- (i) experience in the practice of law;
- (ii) areas of expertise;
- (iii) certification of expertise;

(iv) participation in continuing legal education programs in each of the three years immediately preceding the petition date;

(v) certification by three attorneys who are familiar with the petitioner's present knowledge of the law that the petitioner is competent to engage in the practice of law.

(vi) certification by three attorneys who are familiar with the petitioner's present knowledge of the law that the petitioner is competent to engage in the practice of law;

(C) The factors listed in Rule .0125(a)(4)(B) above are provided by way of example only. The petitioner's satisfaction of one or all of these factors creates no presumption that the petitioner has met the burden of proof established by this section.

(D) The attainment of a passing grade on a regularly scheduled written bar examination administered by the North Carolina Board of Law Examiners and taken voluntarily by the petitioner shall be conclusive evidence on the issue of the petitioner's competence to practice law.

(5) If seven years or more have elapsed between the effective date of disbarment and the filing of the petition for reinstatement, reinstatement will be conditioned upon the petitioner's attaining a passing grade on a regularly scheduled written bar examination administered by the North Carolina Board of Law Examiners.

(6) Verified petitions for reinstatement of disbarred attorneys will be filed with the secretary. Upon receipt of the petition, the secretary will transmit the petition to the chairperson of the commission and serve a copy on the counsel. The chairperson will within 14 days appoint a hearing committee as provided in Rule .0108(a)(2) of this subchapter and schedule a time and place for a hearing to take place within 60 to 90 days after the filing of the petition with the secretary. The chairperson will notify the counsel and the petitioner of the composition of the hearing committee and the time and place of the hearing, which will be conducted in accordance with the North Carolina Rules of Civil Procedure for nonjury trials insofar as possible and the rules of evidence applicable in superior court.

(7) As soon as possible after the conclusion of the hearing, the hearing committee will file a report containing its findings, conclusions, and recommendations with the secretary. This report will be promptly transmitted to the council.

(8) Record to the Council

(A) The petitioner will provide a record of the proceedings before the hearing committee, including a legible copy of the complete transcript, all exhibits introduced into evidence, and all pleadings, motions, and orders, unless the petitioner and the counsel agree in writing to shorten the record. The petitioner will provide the record to the counsel not later than 90 days after the hearing before the hearing committee, unless an extension of time is granted by the secretary for good cause shown. Any agreement regarding the record will be in writing and will be included in the record transmitted to the council.

(B) The petitioner will transmit a copy of the record to each member of the council no later than 30 days before the council meeting at which the petition is to be considered.

(C) The petitioner will bear the costs of transcribing, copying, and transmitting the record to the council.

(D) If the petitioner fails to comply with any of the subsections of Rule .0125(a)(8) above, the counsel may petition the secretary to dismiss the petition.

(9) The council will review the report of the hearing committee and the record and determine whether, and upon what conditions, the petitioner will be reinstated.

(10) No person who has been disbarred and has unsuccessfully petitioned for reinstatement may reapply until the expiration of one year from the date of the last order denying reinstatement.

(b) After suspension

(1) No attorney who has been suspended may have his or her license restored but upon order of the commission or the secretary after the filing of a verified petition as provided herein.

(2) No attorney who has been suspended is eligible for reinstatement until the expiration of the period of suspension and, in no event, until 30 days have elapsed from the date of filing the petition for reinstatement. Petitions for reinstatement may be filed no sooner than 90 days prior to the expiration of the period of suspension.

(3) Any suspended attorney seeking reinstatement must file a verified petition with the secretary, a copy of which the secretary will transmit to the counsel. The petitioner must have satisfied the following requirements to be eligible for reinstatement, and will set forth facts demonstrating the following in the petition:

(A) compliance with Rule .0124 of this subchapter;

(B) compliance with all applicable orders of the commission and the council;

(C) abstention from the unauthorized practice of law during the period of suspension;

(D) attainment of a passing grade on a regularly scheduled North Carolina bar examination, if the suspended attorney applies for reinstatement of his or her license more than seven years after the effective date of the suspension;

(E) abstention from conduct during the period of suspension constituting grounds for discipline under G.S. 84-28(b);

(F) reimbursement of the Client Security Fund of the North Carolina State Bar for all sums, including costs other than overhead expenses, disbursed by the Client Security Fund as a result of the petitioner's misconduct. This section shall not be deemed to permit the petitioner to collaterally attack the decision of the Client Security Fund Board of Trustees regarding whether to reimburse losses occasioned by the misconduct of the petitioner. This provision shall apply to petitions for reinstatement submitted by attorneys who were disciplined after the effective date of this amendment;

(G) reimbursement of all sums which the Disciplinary Hearing Commission found in the order of suspension were misappropriated by the petitioner and which have not been reimbursed by the Client Security Fund.

(4) The counsel will conduct any necessary investigation regarding the compliance of the petitioner with the requirements set forth in Rule .0125(b)(3) above, and the counsel may file a response to the petition with the secretary prior to the date the petitioner is first eligible for reinstatement. The counsel will serve a copy of any response filed upon the petitioner.

(5) If the counsel does not file a response to the petition before the date the petitioner is first eligible for reinstatement, then the secretary will issue an order of reinstatement.

(6) If the counsel files a timely response to the petition, such response must set forth specific objections supported by factual allegations sufficient to put the petitioner on notice of the events at issue.

(7) The secretary will, upon the filing of a response to the petition, refer the matter to the chairperson of the commission. The chairperson will within 14 days appoint a hearing committee as provided in Rule .0108(a)(2) of this subchapter, schedule a time and place for a hearing, and notify the counsel and the petitioner of the composition of the hearing committee and the time and place of the hearing. The hearing will be conducted in accordance with the North Carolina Rules of Civil Procedure for nonjury trials insofar as possible and the rules of evidence applicable in superior court.

(8) The hearing committee will determine whether the petitioner's license should be reinstated and enter an appropriate order which may include additional sanctions in the event violations of the petitioner's order of suspension are found. In any event, the hearing committee must include in its order findings of fact and conclusions of law in support of its decision and tax such costs as it deems appropriate for the necessary expenses attributable to the investigation and processing of the petition against the petitioner.

(c) After transfer to disability inactive status:

(1) No member of the North Carolina State Bar transferred to disability inactive status may resume active status until reinstated by order of the commission. Any member transferred to disability inactive status will be entitled to apply to the commission for reinstatement to active status once a year or at such shorter intervals as are stated in the order transferring the member to disability inactive status or any modification thereof.

(2) Petitions for reinstatement by members transferred to disability inactive status will be filed with the secretary. Upon receipt of the petition the secretary will refer the petition to the commission chairperson. The chairperson will appoint a hearing committee as provided in Rule .0108(a)(2) of this subchapter. A hearing will be conducted pursuant to the procedures set out in Rule .0114 of this subchapter.

(3) The member will have the burden of proving by clear, cogent, and convincing evidence that he or she is no longer disabled within the meaning of Rule .0103(18) of this subchapter and that he or she is fit to resume the practice of law.

(4) Within 10 days of filing the petition for reinstatement, the member will provide the secretary with a list of the name and address of every psychiatrist, psychologist, physician, hospital, and other health care provider by whom or in which the member has been examined or treated or sought treatment while disabled. At the same time, the member will also furnish to the secretary a written consent to release all information and records relating to the disability.

(5) Where a member has been transferred to disability inactive status based solely upon a judicial finding of incapacity, and thereafter a court of competent jurisdiction enters an order adjudicating that the member's incapacity has ended, the chairperson of the commission will enter an order returning the member to active status upon receipt of a certified copy of the court's order. Entry of the order will not preclude the North Carolina State Bar from bringing an action pursuant to Rule .0118 of this subchapter to determine whether the member is disabled.

(6) The hearing committee may direct the member to pay the costs of the reinstatement hearing, including the cost of any medical examination ordered by the committee.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28.1; G.S. 84-29; G.S. 84-30

Readopted Effective December 8, 1994

**.0126 Address of Record**

Except where otherwise specified, any provision herein for notice to a respondent, member, petitioner, or a defendant will be deemed satisfied by appropriate correspondence addressed to that attorney by mail to the last address maintained by the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**.0127 Disqualification Due to Interest**

No member of the council or hearing commission will participate in any disciplinary matter involving the member, any partner, or associate in the practice of law of the member, or in which the member has a personal interest.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

## **.0128 Trust Accounts; Audit**

(a) For reasonable cause, the chairperson of the Grievance Committee is empowered to issue an investigative subpoena to a member compelling the production of any records required to be kept relative to the handling of client funds and property by the Rules of Professional Conduct for inspection, copying, or audit by the counsel or any auditor appointed by the counsel. For the purposes of this rule, any of the following will constitute reasonable cause:

(1) any sworn statement of grievance received by the North Carolina State Bar alleging facts which, if true, would constitute misconduct in the handling of a client's funds or property;

(2) any facts coming to the attention of the North Carolina State Bar, whether through random review as contemplated by Rule .0128(b) below or otherwise, which if true, would constitute a probable violation of any provision of the Rules of Professional Conduct concerning the handling of client funds or property; or

(3) any finding of probable cause, indictment, or conviction relative to a criminal charge involving moral turpitude. The grounds supporting the issuance of any such subpoena will be set forth upon the face of the subpoena.

(b) The chairperson of the Grievance Committee may randomly issue investigative subpoenas to members compelling the production of any records required to be kept relative to the handling of client funds or property by the Rules of Professional Conduct for inspection by the counsel or any auditor appointed by the counsel to determine compliance with the Rules of Professional Conduct. Any such subpoena will disclose upon its face its random character and contain a verification of the secretary that it was randomly issued. No member will be subject to random selection under this section more than once in three years. The auditor may report any violation of the Rules of Professional Conduct discovered during random audit to the Grievance Committee for investigation. The auditor may allow the attorney a reasonable amount of time to correct any procedural violation in lieu of reporting the matter to the Grievance Committee. The auditor shall have authority under the original subpoena for random audit to compel the production of any documents necessary to determine whether the attorney has corrected any violation identified during the audit.

(c) No subpoena issued pursuant to this rule may compel production within five days of service.

(d) The rules of evidence applicable in the superior courts of the state will govern the use of any material subpoenaed pursuant to this rule in any hearing before the commission.

(e) No assertion of attorney-client privilege or confidentiality will prevent an inspection or audit of a trust account as provided in this rule.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

## **.0129 Confidentiality**

(a) Except as otherwise provided in this rule and G.S. 84-28(f), all proceedings involving allegations of misconduct by or alleged disability of a member will remain confidential until

(1) a complaint against a member has been filed with the secretary after a finding by the Grievance Committee that there is probable cause to believe that the member is guilty of misconduct justifying disciplinary action or is disabled;

(2) the member requests that the matter be made public prior to the filing of a complaint;

(3) the investigation is predicated upon conviction of the member of or sentencing for a crime;

(4) a petition or action is filed in the general courts of justice; or

(5) the member files an affidavit of surrender of license.

(b) The previous issuance of a letter of warning, formerly known as a letter of admonition, or an admonition to a member may be revealed in any subsequent disciplinary proceeding.

(c) This provision will not be construed to prohibit the North Carolina State Bar from providing a copy of an attorney's response to a grievance to the complaining party where such attorney has not objected thereto in writing or to deny access to relevant information to authorized agencies investigating the qualifications of judicial candidates, to other jurisdictions investigating qualifications for admission to practice, or to law enforcement agencies investigating qualifications for government employment or allegations of criminal conduct by attorneys. In addition, the secretary will transmit notice of all public discipline imposed and transfers to disability inactive status to the National Discipline Data Bank maintained by the American Bar Association. The secretary may also transmit any relevant information to the Client Security Fund Board of Trustees to assist the Client Security Fund Board in determining losses caused by dishonest conduct of members of the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

## **.0130 Disciplinary Amnesty in Illicit Drug Use Cases**

(a) The North Carolina State Bar will not treat as a grievance information that a member has used or is using illicit drugs except as provided in Rules .0130(c),(d) and(e) below. The information will be provided to the chairperson of the Positive Action for Lawyers Committee (PALS).

(b) If the PALS Committee concludes after investigation that a member has used or is using an illicit drug and the member participates with the PALS Committee and successfully complies with any prescribed course of treatment, whether or not the initial referral to the PALS Committee came from the North Carolina State Bar, the member will not be disciplined by the North Carolina State Bar for illicit drug use occurring prior to the prescribed course of treatment.

(c) If a member under Rule .0130(b) above fails to cooperate with the PALS Committee or fails to successfully complete any treatment prescribed for the member's illicit drug use, the chairperson of the PALS Committee will report such failure to participate in or complete the PALS program to the chairperson of the Grievance Committee. The chairperson of the Grievance Committee will then treat the information originally received as a grievance.

(d) A member charged with a crime relating to the use or possession of illicit drugs will not be entitled to amnesty from discipline by the North Carolina State Bar relating to the illicit drug use or possession.

(e) If the North Carolina State Bar receives information that a member has used or is using illicit drugs and that the member has violated some other provision of the Rules of Professional Conduct, the information regarding the member's alleged illicit drug use will be referred to the chairperson of the PALS Committee pursuant to Rule .0130(a) above. The information regarding the member's alleged additional misconduct will be reported to the chairperson of the Grievance Committee.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

## **Section .0200 Rules Governing Judicial District Grievance Committees**

### **.0201 Organization of Judicial District Grievance Committees**

(a) Judicial Districts Eligible to Form District Grievance Committees

(1) Any judicial district which has more than 100 licensed attorneys as determined by the North Carolina State Bar's records may establish a judicial district grievance committee (hereafter, "district grievance committee") pursuant to the rules and regulations set out herein. A judicial district with fewer than 100 licensed attorneys may establish a district grievance committee with consent of the Council of the North Carolina State Bar.

(2) One or more judicial districts, including those with fewer than 100 licensed attorneys, may also establish a multi-district grievance

committee, as set out in Rule .0201(b)(2) below. Such multi-district grievance committees shall be subject to all of the rules and regulations set out herein and all references to district grievance committees in these rules shall also apply to multi-district grievance committees.

**(b) Creation of District Grievance Committees**

(1) A judicial district may establish a district grievance committee at a duly called meeting of the judicial district bar, at which a quorum is present, upon the affirmative vote of a majority of the active members present. Within 30 days of the election, the president of the judicial district bar shall certify in writing the establishment of the district grievance committee to the secretary of the North Carolina State Bar.

(2) A multi-district grievance committee may be established by affirmative vote of a majority of the active members of each participating judicial district present at a duly called meeting of each participating judicial district bar, at which a quorum is present. Within 30 days of the election, the chairperson of the multi-district grievance committee shall certify in writing the establishment of the district grievance committee to the secretary of the North Carolina State Bar. The active members of each participating judicial district may adopt a set of bylaws not inconsistent with these rules by majority vote of the active members of each participating judicial district present at a duly called meeting of each participating judicial district bar, at which a quorum is present. The chairperson of the multi-district grievance committee shall promptly provide a copy of any such bylaws to the secretary of the North Carolina State Bar.

**(c) Appointment of District Grievance Committee Members**

(1) Each district grievance committee shall be composed of not fewer than five nor more than 13 members, all of whom shall be active members in good standing both of the judicial district bar to which they belong and of the North Carolina State Bar. In addition to the attorney members, each district grievance committee may also include one to three public members who have never been licensed to practice law in any jurisdiction. Public members shall not perform investigative functions regarding grievances but in all other respects shall have the same authority as the attorney members of the district grievance committee.

(2) The chairperson of the district grievance committee shall be selected by the president of the judicial district and shall serve at his or her pleasure. Alternatively, the chairperson may be selected and removed as provided in the district bar bylaws.

(3) The attorney and public members of the district grievance committee shall be selected by and serve at the pleasure of the president of the judicial district bar and the chairperson of the district grievance committee. Alternatively, the district grievance committee members may be selected and removed as provided in the district bar bylaws.

(4) The members of the district grievance committee, including the chairperson, shall be appointed for staggered three-year terms, except that the president and chairperson shall appoint some of the initial committee members to terms of less than three years, to effectuate the staggered terms. No member shall serve more than one term, without first having rotated off the committee for a period of at least one year between three-year terms. Any member who resigns or otherwise becomes ineligible to continue serving as a member shall be replaced by appointment by the president of the judicial district bar and the chairperson of the committee or as provided in the district bar bylaws as soon as practicable.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**.0202 Jurisdiction & Authority of District Grievance Committees**

(a) District Grievance Committees Are Subject to the Rules of the North Carolina State Bar - The district grievance committee shall be sub-

ject to the rules and regulations adopted by the Council of the North Carolina State Bar.

(b) Grievances Filed With District Grievance Committee - A district grievance committee may investigate and consider grievances filed against attorneys who live or maintain offices within the judicial district and which are filed in the first instance with the chairperson of the district grievance committee. The chairperson of the district grievance committee will immediately refer to the State Bar any grievance filed locally in the first instance which

(1) alleges misconduct against a member of the district grievance committee;

(2) alleges that any attorney has embezzled or misapplied client funds; or

(3) alleges any other serious violation of the Rules of Professional Conduct which may be beyond the capacity of the district grievance committee to investigate.

(c) Grievances Referred to District Grievance Committee - The district grievance committee shall also investigate and consider such grievances as are referred to it for investigation by the counsel of the North Carolina State Bar.

**(d) Grievances Involving Fee Disputes**

(1) Notice to Complainant of Fee Arbitration - If a grievance filed initially with the district bar consists solely or in part of a fee dispute, the chairperson of the district grievance committee shall notify the complainant in writing within 10 working days of receipt of the grievance that the complainant may elect to participate in the North Carolina State Bar Fee Dispute Arbitration Program. If the grievance consists solely of a fee dispute, the letter to the complainant shall follow the format set out in Rule .0208 of this subchapter. If the grievance consists in part of matters other than a fee dispute, the letter to the complainant shall follow the format set out in Rule .0209 of this subchapter. A respondent attorney shall not have the right to elect to participate in fee arbitration.

(2) Handling Claims Not Involving Fee Dispute - Where a grievance alleges multiple claims, the allegations not involving a fee dispute will be handled in the same manner as any other grievance filed with the district grievance committee.

(3) Handling Claims Not Submitted to Arbitration by Complainant - If the complainant elects not to participate in the State Bar's Fee Dispute Arbitration Program, or fails to notify the chairperson that he or she elects to participate within 20 days following mailing of the notice referred to in Rule .0202(d)(1) above, the grievance will be handled in the same manner as any other grievance filed with the district grievance committee.

(4) Referral to Fee Dispute Arbitration Program - Where a complainant timely elects to participate in fee arbitration, and the judicial district in which the respondent attorney maintains his or her principal office has a fee arbitration committee, the chairperson of the district grievance committee shall refer the portion of the grievance involving a fee dispute to the judicial district fee arbitration committee. If the judicial district in which the respondent attorney maintains his or her principal office does not have a fee arbitration committee, the chairperson of the district grievance committee shall refer the portion of the grievance involving a fee dispute to the State Bar Fee Dispute Arbitration Program for resolution. If the grievance consists entirely of a fee dispute, and the complainant timely elects to participate in arbitration, no grievance file will be established.

(e) Authority of District Grievance Committees - The district grievance committee shall have authority to

(1) assist a complainant who requests assistance to reduce a grievance to writing;

(2) investigate complaints described in Rule .0202(b) and (c) above by interviewing the complainant, the attorney against whom the griev-

ance was filed and any other persons who may have relevant information regarding the grievance and by requesting written materials from the complainant, respondent attorney, and other individuals;

(3) explain the procedures of the district grievance committee to complainants and respondent attorneys;

(4) find facts and recommend whether or not the State Bar's Grievance Committee should find that there is probable cause to believe that the respondent has violated one or more provisions of the Rules of Professional Conduct. The district grievance committee may also make a recommendation to the State Bar regarding the appropriate disposition of the case, including referral to the Lawyers' Management Assistance Program;

(5) draft a written report stating the grounds for the recommended disposition of a grievance assigned to the district grievance committee;

(6) notify the complainant and the respondent attorney where the district grievance committee recommends that the State Bar find that there is no probable cause to believe that the respondent has violated the Rules of Professional Conduct. Where the district grievance committee recommends that the State Bar find that there is probable cause to believe that the respondent has violated one or more provisions of the Rules of Professional Conduct, the committee shall notify the respondent attorney of its recommendation and shall notify the complainant that the district grievance committee has concluded its investigation and has referred the matter to the State Bar for final resolution. Where the district grievance committee recommends a finding of no probable cause, the letter of notification to the respondent attorney and to the complainant shall follow the format set out in Rule .0210 of this subchapter. Where the district grievance committee recommends a finding of probable cause, the letter of notification to the respondent attorney shall follow the format set out in Rule .0211 of this subchapter. The letter of notification to the complainant shall follow the format set out in Rule .0212 of this subchapter;

(7) maintain records of grievances investigated by the district grievance committee for at least one year from the date on which the district grievance committee makes its final recommendation regarding a grievance to the State Bar.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.0203 Meetings of the District Grievance Committees**

(a) Notice of Meeting - The district grievance committee shall meet at the call of the chairperson upon reasonable notice, as often as is necessary to dispatch its business and not less than once every 60 days, provided the committee has grievances pending.

(b) Confidentiality - The district grievance committee shall meet in private. Discussions of the committee, its records and its actions shall be confidential. The names of the members of the committee shall not be confidential.

(c) Quorum - A simple majority of the district grievance committee must be present at any meeting in order to constitute a quorum. The committee may take no action unless a quorum is present. A majority vote in favor of a motion or any proposed action shall be required for the motion to pass or the action to be taken.

(d) Appearances by Complainants and Respondents - No complainant nor any attorney against whom a grievance has been filed may appear before the district grievance committee, present argument to or be present at the committee's deliberations.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.0204 Procedure Upon Institution of a Grievance**

(a) Receipt of Grievance - A grievance may be filed by any person against a member of the North Carolina State Bar. Such grievance must be in writing and signed by the complaining person. A district grievance

committee may, however, investigate matters which come to its attention during the investigation of a grievance, whether or not such matters are included in the original written grievance.

(b) Acknowledgment of Receipt of Grievance from State Bar - The chairperson of the district grievance committee shall send a letter to the complainant within 10 working days of receipt of the grievance from the State Bar, acknowledging that a grievance file has been set up. The acknowledgment letter shall include the name of the district grievance committee member assigned to investigate the matter and shall follow the format set out in Rule .0213 of this subchapter. A copy of the letter shall be sent contemporaneously to the office of counsel of the State Bar.

(c) Notice to State Bar of Locally Filed Grievances

(1) Where a grievance is filed in the first instance with the district grievance committee, the chairperson of the district grievance committee shall notify the office of counsel of the State Bar of the name of the complainant, respondent attorney, file number and nature of the grievance within 10 working days of receipt of the grievance.

(2) The chairperson of the district grievance committee shall send a letter to the complainant within 10 working days of receipt of the grievance, acknowledging that a grievance file has been set up. The acknowledgment letter shall include the name of the district grievance committee member assigned to investigate the matter and shall follow the format set out in Rule .0213 of this subchapter.

(3) Grievances filed initially with the district grievance committee shall be assigned a local file number which shall be used to refer to the grievance. The first two digits of the file number shall indicate the year in which the grievance was filed, followed by the number of the judicial district, the letters GR, and ending with the number of the file. File numbers shall be assigned sequentially during the calendar year, beginning with the number 1. For example, the first locally filed grievance set up in the 10th judicial district in 1994 would bear the following number: 9410GR001.

(d) Assignment to Investigating Member - Within 10 working days after receipt of a grievance, the chairperson shall appoint a member of the district grievance committee to investigate the grievance and shall forward the relevant materials to the investigating member. The letter to the investigating member shall follow the format set out in Rule .0214 of this subchapter.

(e) Investigation of the Grievance

(1) The investigating member shall attempt to contact the complainant as soon as possible but no later than 15 working days after receiving notice of the assignment. If the initial contact with the complainant is made in writing, the letter shall follow the format set out in Rule .0215 of this subchapter.

(2) The investigating member shall have the authority to contact other witnesses or individuals who may have information about the subject of the grievance, including the respondent.

(3) The failure of the complainant to cooperate shall not cause a grievance to be dismissed or abated. Once filed, grievances shall not be dismissed or abated upon the request of the complainant.

(f) Letter of Notice to Respondent Attorney and Responses

(1) Within 10 working days after receipt of a grievance, the chairperson of the district grievance committee shall send a copy of the grievance and a letter of notice to the respondent attorney. The letter to the respondent attorney shall follow the form set out in Rule .0216 of this subchapter and shall be sent by U.S. Mail to the attorney's last known address on file with the State Bar. The letter of notice shall request the respondent to reply to the investigating attorney in writing within 15 days after receipt of the letter of notice.

(2) A substance of grievance will be provided to the district grievance committee by the State Bar at the time the file is assigned to the committee. The substance of grievance will summarize the nature of

the complaint against the respondent attorney and cite the applicable provisions of the Rules of Professional Conduct, if any.

(3) The respondent attorney shall respond in writing to the letter of notice from the district grievance committee within 15 days of receipt of the letter. The chairperson of the district grievance committee may allow a longer period for response, for good cause shown.

(4) If the respondent attorney fails to respond in a timely manner to the letter of notice, the chairperson of the district grievance committee may seek the assistance of the State Bar to issue a subpoena or take other appropriate steps to ensure a proper and complete investigation of the grievance. District grievance committees do not have authority to issue a subpoena to a witness or respondent attorney.

(5) Unless necessary to complete its investigation, the district grievance committee should not release copies of the respondent attorney's response to the grievance to the complainant. The investigating attorney may summarize the response for the complainant orally or in writing.

**(g) District Grievance Committee Deliberations**

(1) Upon completion of the investigation, the investigating member shall promptly report his or her findings and recommendations to the district grievance committee in writing.

(2) The district grievance committee shall consider the submissions of the parties, the information gathered by the investigating attorney and such other material as it deems relevant in reaching a recommendation. The district grievance committee may also make further inquiry as it deems appropriate, including investigating other facts and possible violations of the Rules of Professional Conduct discovered during its investigation.

(3) The district grievance committee shall make a determination as to whether or not it finds that there is probable cause to believe that the respondent violated one or more provisions of the Rules of Professional Conduct.

**(h) Report of Committee's Decision**

(1) Upon making a decision in a case, the district grievance committee shall submit a written report to the office of counsel, including its recommendation and the basis for its decision. The original file and grievance materials of the investigating attorney shall be sent to the State Bar along with the report. The letter from the district bar grievance committee enclosing the report shall follow the format set out in Rule .0217 of this subchapter.

(2) The district grievance committee shall submit its written report to the office of counsel no later than 180 days after the grievance is initiated or received by the district committee. The State Bar may recall any grievance file which has not been investigated and considered by a district grievance committee within 180 days after the matter is assigned to the committee. The State Bar may also recall any grievance file for any reason.

(3) Within 10 working days of submitting the written report and returning the file to the office of counsel, the chairperson of the district grievance committee shall notify the respondent attorney and the complainant in writing of the district grievance committee's recommendation, as provided in Rule .0202(d)(6) of this subchapter.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**.0205 Record Keeping**

The district grievance committee shall maintain records of all grievances referred to it by the State Bar and all grievances initially filed with the district grievance committee for at least one year. The district grievance committee shall provide such reports and information as are requested of it from time to time by the State Bar.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**.0206 Miscellaneous**

(a) Assistance and Questions - The office of counsel, including the staff attorneys and the grievance coordinator, are available to answer questions and provide assistance regarding any matters before the district grievance committee.

(b) Missing Attorneys - Where a respondent attorney is missing or cannot be located, the district grievance committee shall promptly return the grievance file to the office of counsel for appropriate action.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**.0207 Conflicts of Interest**

(a) No district grievance committee shall investigate or consider a grievance which alleges misconduct by any current member of the committee. If a file is referred to the committee by the State Bar or is initiated locally which alleges misconduct by a member of the district grievance committee, the file will be sent to the State Bar for investigation and handling within 10 working days after receipt of the grievance.

(b) A member of a district grievance committee shall not investigate or participate in deliberations concerning any of the following matters:

(1) alleged misconduct of an attorney who works in the same law firm or office with the committee member;

(2) alleged misconduct of a relative of the committee member;

(3) a grievance involving facts concerning which the committee member or a partner or associate in the committee member's law firm acted as an attorney.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**.0208 Letter to Complainant Where Local Grievance Alleges Fee Dispute Only**

John Smith

Anywhere, N.C.

Re: Your complaint against Jane Doe

Dear Mr. Smith:

The [ ] district grievance committee has received your complaint against above-listed attorney. Based upon our initial review of the materials which you submitted, it appears that your complaint involves a fee dispute. Accordingly, I would like to take this opportunity to notify you of the North Carolina State Bar Fee Dispute Arbitration Program. The program is designed to provide citizens with a means of resolving disputes over attorney fees at no cost to them and without going to court. A pamphlet which describes the program in greater detail is enclosed, along with an application form.

If you would like to participate in the fee arbitration program, please complete and return the form to me within 20 days of the date of this letter. If you decide to go through arbitration, no grievance file will be opened and the [ ] district bar grievance committee will take no other action against the attorney.

If you do not wish to participate in the fee arbitration program, you may elect to have your complaint investigated by the [ ] district grievance committee. If we do not hear from you within 20 days of the date of this letter, we will assume that you do not wish to participate in fee arbitration, and we will handle your complaint like any other grievance. However, the [ ] district grievance committee has no authority to attempt to resolve a fee dispute between an attorney and his or her client. Its sole function is to investigate your complaint and make a recommendation to the North Carolina State Bar regarding whether there is probable cause to believe that the attorney has violated one or more provisions of the Rules of Professional Conduct which govern attorneys in this state.

Thank you for your cooperation.

Sincerely yours,

[ ] Chairperson

[ ] District Bar Grievance Committee

cc: PERSONAL & CONFIDENTIAL

Director of Investigations, The N.C. State Bar  
History Note: Statutory Authority G.S. 84-23  
Readopted Effective December 8, 1994

**.0209 Letter to Complainant Where Local Grievance Alleges Fee Dispute and Other Violations**

John Smith  
Anywhere, N.C.  
Re: Your complaint against Jane Doe  
Dear Mr. Smith:

The ☐ district grievance committee has received your complaint against above-listed attorney. Based upon our initial review of the materials which you submitted, it appears that your complaint involves a fee dispute as well as other possible violations of the rules of ethics. Accordingly, I would like to take this opportunity to notify you of the North Carolina State Bar Fee Dispute Arbitration Program. The program is designed to provide citizens with a means of resolving disputes over attorney fees at no cost to them and without going to court. A pamphlet which describes the program in greater detail is enclosed, along with an application form.

If you would like to participate in the fee arbitration program, please complete and return the form to me within 20 days of the date of this letter. If you decide to go through arbitration, the fee arbitration committee will handle those portions of your complaint which involve an apparent fee dispute. The remaining parts of your complaint which do not involve a fee dispute will be investigated by the ☐ district grievance committee.

If you do not wish to participate in fee arbitration program, you may elect to have your entire complaint investigated by the ☐ district grievance committee. If we do not hear from you within 20 days of the date of this letter, we will assume that you do not wish to participate in fee arbitration, and we will handle your entire complaint like any other grievance. However, the ☐ district grievance committee has no authority to attempt to resolve a fee dispute between an attorney and his or her client. Its sole function is to investigate your complaint and make a recommendation to the North Carolina State Bar regarding whether there is probable cause to believe that the attorney has violated one or more provisions of the Rules of Professional Conduct which govern attorneys in this state.

Thank you for your cooperation.

Sincerely yours,

☐ Chairperson

☐ District Bar Grievance Committee

cc: PERSONAL & CONFIDENTIAL

Director of Investigations, The N.C. State Bar

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**.0210 Letter to Complainant/Respondent Where District Committee Recommends Finding of No Probable Cause**

John Smith  
Anywhere, N.C.  
Re: Your complaint against Jane Doe Our File No. ☐  
Dear Mr. Smith:

The ☐ district grievance committee has completed its investigation of your grievance. Based upon its investigation, the committee does not believe that there is probable cause to find that the attorney has violated any provisions of the Rules of Professional Conduct. The committee will forward a report with its recommendation to the North Carolina State Bar Grievance Committee. The final decision regarding your grievance will be made by the North Carolina State Bar Grievance Committee. You will be notified in writing of the State Bar's decision.

If you have any questions or wish to communicate further regarding your grievance, you may contact the North Carolina State Bar at the following address: The North Carolina State Bar Grievance Committee, P.O. Box 25908, Raleigh, N.C. 27611

Neither I nor any member of the ☐ district grievance committee can give you any advice regarding any legal rights you may have regarding the matters set out in your grievance. You may pursue any questions you have regarding your legal rights with an attorney of your choice.

Thank you very much for your cooperation.

Sincerely yours,

☐ Chairperson

☐ District Grievance Committee

cc: PERSONAL AND CONFIDENTIAL

☐ Respondent Attorney

PERSONAL AND CONFIDENTIAL

Director of Investigations, The N.C. State Bar

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**.0211 Letter to Respondent Where District Committee Recommends Finding of Probable Cause**

Ms. Jane Doe  
Anywhere, N.C.  
Re: Grievance of John Smith Our File No. ☐  
Dear Ms. Doe:

The ☐ district grievance committee has completed its investigation of Mr. Smith's grievance and has voted to recommend that the North Carolina State Bar Grievance Committee find probable cause to believe that you violated one or more provisions of the Rules of Professional Conduct. Specifically, the ☐ district grievance committee found that there is probable cause to believe that you may have violated [set out brief description of rule allegedly violated and pertinent facts].

The final decision in this matter will be made by the North Carolina State Bar Grievance Committee and you will be notified in writing of the State Bar's decision. The complainant has been notified that the ☐ district grievance committee has concluded its investigation and that the grievance has been sent to the North Carolina State Bar for final resolution, but has not been informed of the ☐ district committee's specific recommendation.

If you have any questions or wish to communicate further regarding this grievance, you may contact the North Carolina State Bar at the following address: The North Carolina State Bar Grievance Committee, P.O. Box 25908 Raleigh, N.C. 27611, Tel. 919-828-4620

Thank you very much for your cooperation.

Sincerely yours,

☐ Chairperson

☐ District Grievance Committee

cc: PERSONAL AND CONFIDENTIAL

Director of Investigations, The N.C. State Bar

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**.0212 Letter to Complainant Where District Committee Recommends Finding of Probable Cause**

John Smith  
Anywhere, N.C.  
Re: Your complaint against Jane Doe Our File No. ☐  
Dear Mr. Smith:

The ☐ district grievance committee has completed its investigation of your grievance and has forwarded its file to the North Carolina State Bar Grievance Committee in Raleigh for final resolution. The final decision in this matter will be made by the North Carolina State Bar Grievance Committee and you will be notified in writing of the State Bar's decision.

If you have any questions or wish to communicate further regarding your grievance, you may contact the North Carolina State Bar at the following address: The North Carolina State Bar Grievance Committee P.O. Box 25908 Raleigh, N.C. 27611

Neither I nor any member of the ☐ district grievance committee can give you any advice regarding any legal rights you may have regarding

the matters set out in your grievance. You may pursue any questions you have regarding your legal rights with an attorney of your choice.

Thank you very much for your cooperation.

Sincerely yours,

[ ] Chairperson

[ ] District Grievance Committee

cc: PERSONAL AND CONFIDENTIAL

[ ] Respondent Attorney

PERSONAL AND CONFIDENTIAL

Director of Investigations, The N.C. State Bar

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### **.0213 Letter to Complainant Acknowledging Grievance**

John Smith

Anywhere, N.C.

Re: Your complaint against Jane Doe Our File No. [ ]

Dear Mr. Smith:

I am the chairperson of the [ ] district grievance committee. Your grievance against [respondent attorney] [was received in my office] [has been forwarded to my office by the North Carolina State Bar] on [date]. I have assigned [investigator's name], a member of the [ ] district grievance committee, to investigate your grievance. [ ]'s name, address and telephone number are as follows: [ ].

Please be sure that you have provided all information and materials which relate to or support your complaint to the [ ] district grievance committee. If you have other information which you would like our committee to consider, or if you wish to discuss your complaint, please contact the investigating attorney by telephone or in writing as soon as possible.

After [ ]'s investigation is complete, the [ ] district grievance committee will make a recommendation to the North Carolina State Bar Grievance Committee regarding whether or not there is probable cause to believe that [respondent attorney] violated one or more provisions of the Rules of Professional Conduct. Your complaint and the results of our investigation will be sent to the North Carolina State Bar at that time. The [ ] district grievance committee's recommendation is not binding upon the North Carolina State Bar Grievance Committee, which will make the final determination. You will be notified in writing when the [ ] district grievance committee's investigation is concluded.

Neither the investigating attorney nor any member of the [ ] district grievance committee can give you any legal advice or represent you regarding any underlying legal matter in which you may be involved. You may pursue any questions you have about your legal rights with an attorney of your own choice.

Thank you very much for your cooperation.

Sincerely yours,

[ ] Chairperson

[ ] District Grievance Committee

cc: PERSONAL AND CONFIDENTIAL

Director of Investigations, The N.C. State Bar

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### **.0214 Letter to Investigating Attorney Assigning Grievance**

James Roe

[ ] District Grievance Committee Member

Anywhere, N.C.

Re: Grievance of John Smith against Jane Doe Our File No. [ ]

Dear Mr. Roe:

Enclosed you will find a copy of the grievance which I recently received regarding the above-captioned matter. Please investigate the complaint and provide a written report with your recommendations by [deadline].

Thank you very much. Sincerely yours,

[ ] Chairperson

[ ] District Grievance Committee

cc: PERSONAL AND CONFIDENTIAL

Director of Investigations, The N.C. State Bar

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### **.0215 Letter to Complainant from Investigating Attorney**

John Smith

Anywhere, N.C.

Re: Your complaint against Jane Doe Our File No. [ ]

Dear Mr. Smith:

I am the member of the [ ] district grievance committee assigned to investigate your grievance against [respondent attorney]. It is part of my job to ensure that you have had a chance to explain your complaint and that the [ ] district grievance committee has copies of all of the documents which you believe relate to your complaint.

If you have other information or materials which you would like the [ ] district grievance committee to consider, or if you would like to discuss this matter, please contact me as soon as possible.

If you have already fully explained your complaint, you do not need to take any additional action regarding your grievance. The [ ] district grievance committee will notify you in writing when its investigation is complete. At that time, the matter will be forwarded to the North Carolina State Bar Grievance Committee in Raleigh for its final decision. You will be notified in writing of the North Carolina State Bar's decision.

Thank you very much for your cooperation.

Sincerely yours,

[ ] Investigating Member

[ ] District Grievance Committee

cc: PERSONAL AND CONFIDENTIAL

Chairperson, [ ] District Grievance Committee

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### **.0216 Letter of Notice to Respondent Attorney**

Ms. Jane Doe

Anywhere, N.C.

Re: Grievance of John Smith Our File No. [ ]

Dear Ms. Doe:

Enclosed you will find a copy of a grievance which has been filed against you by [complainant] and which was received in my office on [date]. As chairperson of the [ ] district grievance committee, I have asked [investigating attorney], a member of the committee, to investigate this grievance.

Please file a written response with [investigating attorney] within 15 days from receipt of this letter. Your response should provide a full and fair disclosure of all of the facts and circumstances relating to the matters set out in the grievance.

Thank you.

Sincerely yours,

[ ] Chairperson

[ ] District Grievance Committee

cc: PERSONAL AND CONFIDENTIAL

[ ] Investigating member

[ ] District Grievance Committee

PERSONAL AND CONFIDENTIAL

Director of Investigations, N.C. State Bar

PERSONAL AND CONFIDENTIAL

[ ] Complainant

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

## **.0217 Letter Transmitting Completed File to North Carolina State Bar**

Director of Investigations

N.C. State Bar

P.O. Box 25908

Raleigh, N.C. 27611

Re: Grievance of John Smith File No. [ ]

Dear Director:

The [ ] district grievance committee has completed its investigation in the above-listed matter. Based upon our investigation, the committee determined in its opinion that there is/is not probable cause to believe that the respondent violated one or more provisions of the Rules of Professional Conduct for the reasons set out in the enclosed report.

We are forwarding this matter for final determination by the North Carolina State Bar Grievance Committee along with the following materials:

1. The original grievance of [complainant]
2. A copy of the file of the investigating attorney.
3. The investigating attorney's report, which includes a summary of the facts and the reason(s) for the committee's decision.

Please let me know if you have any questions or if you need any additional information. Thank you.

Sincerely yours,

[ ] Chairperson

[ ] District Grievance Committee

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

## **SUBCHAPTER C**

### **Rules Governing the Board of Law Examiners and the Training of Law Students**

#### **Section .0100 Board of Law Examiners**

##### **.0101 Election**

(a) At the first meeting of the council, it shall elect as members of the Board of Law Examiners, two members of the State Bar to serve for a term of one year from July 1, 1933; and two members of the State Bar to serve for a term of two years from July 1, 1933; and two members of the State Bar to serve for a term of three years from July 1, 1933. The council, at its regular meeting, in April of each year, beginning in 1934, shall elect two members of the Board of Law Examiners to take office on the 1st day of July of the year in which they are elected, and such members shall serve for a term of three years or until their successors are elected and qualified. Beginning with the year 1935 and every third year thereafter the council shall elect three members for a term of three years or until their successors are elected and qualified.

(b) No member of the council shall be a member of the Board of Law Examiners, and no member of the Board of Law Examiners shall be a member of the council.

History Note: Statutory Authority G.S. 84-24

Readopted Effective December 8, 1994

##### **.0102 Examination of Applicants for License**

All applicants for admission to the Bar shall first obtain a certificate or license from the Board of Law Examiners in accordance with the rules and regulations of that board.

History Note: Statutory Authority G.S. 84-24

Readopted Effective December 8, 1994

##### **.0103 Admission to Practice**

Upon receiving license to practice law from the Board of Law Examiners, the applicant shall be admitted to the practice thereof by taking the oath in the manner and form now provided by law.

History Note: Statutory Authority G.S. 84-24

Readopted Effective December 8, 1994

##### **.0104 Approval of Rules and Regulations of Board of Law Examiners**

The council shall, as soon as possible, after the presentation to it of rules and regulations for admission to the Bar, approve or disapprove such rules and regulations. The rules and regulations approved shall immediately be certified to the Supreme Court. Such rules and regulations as may not be approved by the council shall be the subject of further study and action, and for the purpose of study, the council and Board of

Law Examiners may sit in joint session. No action, however, shall be taken by the joint meeting, but each shall act separately, and no rule or regulation shall be certified to the Supreme Court until approved by the council.

History Note: Statutory Authority G.S. 84-24

Readopted Effective December 8, 1994

#### **Section .0200 Rules Governing Practical Training of Law Students**

##### **.0201 Purpose**

The Bench and Bar are primarily responsible for making available competent legal services for all persons including those unable to pay for these services. As one means of providing assistance to attorneys representing clients unable to pay for such services and to encourage law schools to provide their students with supervised practical training of varying kinds during the period of their formal legal education, the following rules are adopted.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

##### **.0202 General Definition**

Subject to additional definitions contained in these rules which are applicable to specific articles or parts thereof, and unless the context otherwise requires, in these rules:

(1) Legal aid clinic - An established or proposed department, division, program or course in a law school under the supervision of at least one full-time member of the school's faculty or staff who has been admitted and licensed to practice law in this state and conducted regularly and systematically to render legal services to indigent persons.

(2) Indigent persons - A person financially unable to employ the legal services of an attorney as determined by a standard of indigence established by a judge of the General Court of Justice.

(3) Legal aid - Legal services of a civil, criminal or other nature rendered for or on behalf of an indigent person without charge to such person.

(4) Supervising attorney - Supervising attorney means sole practitioner, one or more attorneys sharing offices but not partners, one or more attorneys practicing together in a partnership or in a professional organization.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.0203 Eligibility**

In order to engage in activities permitted by these rules, a law student must

- (1) be duly enrolled in a law school approved by the Council of the North Carolina State Bar;
- (2) be a student regularly enrolled and in good standing in a law school who has satisfactorily completed the equivalent of three semesters of the requirements for a first professional degree in law (J.D. or its equivalent);
- (3) be certified by the dean of his or her law school, on forms provided by the North Carolina State Bar, as being of good character with requisite legal ability and training to perform as a legal intern. Certification may be denied or, if granted, withdrawn by the dean without a hearing or any showing of cause and for any reason;
- (4) be introduced to the court in which he or she is appearing by an attorney admitted to practice in that court;
- (5) neither ask for nor receive any compensation or remuneration of any kind from any client for whom he or she renders services, but this shall not prevent an attorney, legal aid bureau, law school, public defender agency, or the state from paying compensation to the eligible law student, nor shall it prevent any agency from making such charges for its services as it may otherwise properly require;
- (6) certify in writing that he or she has read and is familiar with the North Carolina Rules of Professional Conduct and the opinions interpretive thereof.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.0204 Form and Duration of Certification**

- (a) A certification of a student by the law school dean

(1) shall be filed with the secretary of the North Carolina State Bar in the office of the North Carolina State Bar in Raleigh and, unless it is sooner withdrawn, it shall remain in effect until the expiration of 18 months after it is filed, or until the announcement of the results of the first bar examination following the student's graduation, whichever is earlier. For any student who passes that examination, a certification shall continue in effect until the date he or she is admitted to the Bar;

(2) may be withdrawn by the dean at any time without a hearing and without any showing of cause and shall be withdrawn by the dean if the student ceases to be duly enrolled as a student prior to graduation, by mailing a notice to that effect to the secretary of the North Carolina State Bar at the office of the North Carolina State Bar in Raleigh, to the supervising attorney, and to the student;

(3) may be withdrawn by any resident superior court judge or judge holding court in any judicial district in which the student is appearing or has appeared at any time without notice or hearing and without any showing of cause. Notice of the withdrawal shall be mailed to the student, to the supervising attorney, to the student's dean, and to the secretary of the North Carolina State Bar at the office of the North Carolina State Bar in Raleigh.

(b) Forms to be used for certification and withdrawal of certification shall be adopted by the council.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.0205 Supervision**

- (a) A supervising attorney shall

(1) be an active member of the North Carolina State Bar and before supervising the activities specified in Rule .0206 of this subchapter shall have actively practiced law as a full-time occupation for at least two years;

(2) supervise no more than five students concurrently, unless such attorney is a full-time member of a law school's faculty or staff whose primary responsibility is supervising students in a clinical program;

(3) assume personal professional responsibility for any work undertaken by the student while under his or her supervision;

(4) assist and counsel with the student in the activities mentioned in these rules and review such activities with such student, all to the extent required for the proper practical training of the student and the protection of the client;

(5) read, approve and personally sign any pleadings or other papers prepared by such student prior to the filing thereof, and read and approve any documents which shall be prepared by such student for execution by any person or persons not a member or members of the North Carolina State Bar prior to the submission thereof for execution;

(6) as to any of the activities specified by Rule .0206 of this subchapter

(A) file with the secretary of the North Carolina State Bar in Raleigh, before commencing supervision of any student, a signed notice in writing stating the name of such student, the period or periods during which he or she expects to supervise the activities of such student, and that he or she will adequately supervise such student in accordance with these rules;

(B) notify the secretary of the North Carolina State Bar in the office of the North Carolina State Bar in Raleigh in writing promptly whenever his or her supervision of such student shall cease.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.0206 Activities**

(a) A properly certified student may engage in the activities provided in this rule under the supervision of an attorney qualified and acting in accordance with the provisions of Rule .0205 of this subchapter.

(b) Without the presence of the supervising attorney, a student may give advice to a client on legal matters provided that the student gives a clear prior explanation to the client that the student is not an attorney and provided that the supervising attorney has given the student permission to render legal advice in the subject area involved.

(c) Without being physically accompanied by the supervising attorney, a student may represent indigent persons or the state in the following hearings or proceedings:

(1) administrative hearings and proceedings before federal, state, and local administrative bodies;

(2) civil litigation before courts or magistrates, provided the case is one which could be assigned to a magistrate under G.S. 7A-210(1) and (2), whether or not assignment is in fact requested or made to a magistrate;

(3) in any criminal matter, except those criminal matters in which the defendant has the right to the assignment of counsel under any constitutional provision, statute or rule of court.

(d) Without being physically accompanied by the supervising attorney, a student may represent the state in the prosecution of all misdemeanors with the consent of the district attorney.

(e) When physically accompanied by the supervising lawyer who has read, approved and personally signed any briefs, pleadings, or other papers prepared by the student for presentment to the court, a student may represent indigent clients or the state in the following hearings or proceedings, provided, however, the approval of the presiding judge is first secured:

(1) all juvenile proceedings;

(2) the presentation of a brief and oral argument in any civil or criminal matter in the district or superior court;

(3) all misdemeanor cases;

(4) preliminary hearings in all criminal cases;

(5) all postconviction proceedings;

(6) all civil discovery.

(f) A student may accompany the supervising attorney when the supervising attorney is attorney of record for an indigent client in any civil or criminal action, but may take part in the proceedings only with the consent of the presiding judge.

(g) In all cases under this rule in which a student makes an appearance in court or before an administrative agency on behalf of a client, the student shall have the written consent in advance of the client and the supervising attorney. The client shall be given a clear explanation, prior to the giving of his or her consent, that the student is not an attorney. This consent shall be filed with the court and made a part of the record in the case.

(h) In all cases under this rule in which a student is permitted to make an appearance in court or before an administrative agency on behalf of a client, the student may engage in all activities appropriate to the representation of the client, including, without limitation, selection of and argument to the jury, examination and cross-examination of witnesses, motions and arguments thereon, and giving notices of appeal.

(i) Except as herein allowed, the certified student shall not be permitted to participate in any activity in the connection with the practical training of law students unless the student is under the direct and physical supervision of the supervising attorney.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### .0207 Use of Student's Name

(a) A student's name may properly

(1) be printed or typed on briefs, pleadings, and other similar documents on which the student has worked with or under the direction of the supervising attorney, provided the student is clearly identified as a student certified under these rules, and provided further that the student shall not sign his or her name to such briefs, pleadings, or other similar documents;

(2) be signed to letters written on the supervising attorney's letterhead which relate to the student's supervised work, provided there appears below his or her signature a clear identification that he or she is certified under these rules, such as "Certified Law Student under the Supervision of \_\_\_\_\_" (supervising attorney).

(b) A student's name may not appear

(1) on the letterhead of a supervising attorney;

(2) on a business card bearing the name of a supervising attorney;

or

(3) on a business card identifying the student as certified under these rules.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### .0208 Miscellaneous

(a) Nothing contained in these rules shall affect the right of any person who is not admitted to practice law to do anything that he or she might lawfully do prior to the adoption of these rules.

(b) These rules are subject to amendment, modification, revision, supplementation, repeal, or other change by appropriate action in the future without notice to any student certified at the time under these rules.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### .0209 Dean's Certificate

IN RE:

APPLICATION OF

CERTIFICATION OF ELIGIBILITY AND GOOD MORAL CHARACTER TO PARTICIPATE IN THE PRACTICAL TRAINING OF

### LAW STUDENTS PROGRAM PROMULGATED BY THE COUNCIL OF THE NORTH CAROLINA STATE BAR

TO: THE NORTH CAROLINA STATE BAR:

The undersigned certified as follows:

1. Name and address of person signing this certificate

2. Name and address of law school and official connection with same

3. \_\_\_\_\_ is duly enrolled in a law school approved by the Council of the North Carolina State Bar and is in good standing in said law school and has satisfactorily completed the equivalent of three semesters of the requirements for a first professional degree in law (J.D. or its equivalent).

4. \_\_\_\_\_ is of good character with the requisite legal ability and training to perform as a legal intern pursuant to the Rules Governing Practical Training of Law Students.

Seal (of school)

\_\_\_\_\_, Dean  
\_\_\_\_\_, Name of School

\_\_\_\_\_, dean of \_\_\_\_\_ Law School being first duly sworn on oath deposes and says that he or she has read the foregoing certificate and knows the contents thereof; that the statements contained therein are true of his or her own knowledge, except as to those matters stated upon information and belief, and, as to those, he or she believes them to be true.

Sworn and subscribed to before me this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_ Notary Public

My commission expires

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### .0210 Withdrawal of Dean's Certificate

IN RE:

APPLICATION OF

### WITHDRAWAL OF ELIGIBILITY TO PARTICIPATE IN THE PRACTICAL TRAINING OF LAW STUDENTS PROMULGATED BY THE COUNCIL OF THE NORTH CAROLINA STATE BAR

TO: THE NORTH CAROLINA STATE BAR:

The undersigned, having previously certified to the Council of the North Carolina State Bar as to the eligibility of the above named individual to participate in the Practical Training of Law Students Program promulgated by the North Carolina State Bar, does hereby WITHDRAW said certificate of eligibility and does hereby notify the North Carolina State Bar that \_\_\_\_\_ is no longer eligible to participate in said program.

Seal (of school)

\_\_\_\_\_, Dean  
\_\_\_\_\_, Name of School

\_\_\_\_\_, dean of \_\_\_\_\_ Law School being first duly sworn on oath deposes and says that he or she has read the foregoing certificate and knows the contents thereof; that the statements contained therein are true of his or her own knowledge, except as to those matters stated upon information and belief and, as to those, he or she believes them to be true.

Sworn and subscribed to before me this the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_

My commission expires

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

## SUBCHAPTER D

### Rules of the Standing Committees of the North Carolina State Bar

#### Section .0100 Procedures for Ruling on Questions of Legal Ethics

##### .0101 Definitions

- (1) "Assistant executive director" shall mean the assistant executive director of the Bar.
- (2) "Attorney" shall mean any active member of the Bar.
- (3) "Bar" shall mean the North Carolina State Bar.
- (4) "Chairperson" shall mean the chairperson, or in his or her absence, the vice-chairperson of the Ethics Committee of the Bar.
- (5) "Citizen" shall mean any person, firm, or corporation residing in North Carolina who is not an attorney as above defined.
- (6) "Committee" shall mean the Ethics Committee of the Bar.
- (7) "Council" shall mean the council of the Bar.
- (8) "Ethics advisory" shall mean an informal legal ethics ruling issued by the executive director or the assistant executive director under the supervision of the committee. The advisories shall be designated by the letters "EA," numbered, and kept on file at the Bar's headquarters.
- (9) "Ethics decision" shall mean a ruling by the council in response to a request for a legal ethics opinion which, because of its special facts or for other reasons, does not warrant issuance of a published opinion. The decisions shall be designated by the letters "ED," numbered, and kept on file at the Bar's headquarters.
- (10) "Executive director" shall mean the executive director of the Bar.
- (11) "Grievance Committee" shall mean the Grievance Committee of the Bar.
- (12) "Legal ethics opinion" shall mean an opinion issued by the council to provide ethical guidance for attorneys and to establish a principle of ethical conduct. Such opinions are published and designated by the letters "RPC" with a number to identify them as interpretations of the Rules of Professional Conduct.
- (13) "President" shall mean the president of the Bar, or, in his or her absence, the presiding officer of the council.
- (14) "Published" shall mean published in the North Carolina State Bar Newsletter.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

##### .0102 Requests for Legal Ethics Opinions and Ethics Advisories (General Provisions)

- (a) Any attorney or citizen may request the Bar to rule on actual or contemplated professional conduct of an attorney in the form and manner provided hereinafter. The grant or denial of the request rests with the discretion of the executive director, assistant executive director, committee, or the council.
- (b) Attorneys may initiate a request for an ethics advisory either in writing, by telephone, or in person regarding conduct which they contemplate and in good faith believe is either a routine matter or requires urgent action in order to protect some legal right, privilege, or interest. If the request is initiated verbally, the requesting attorney must promptly confirm the request in writing.
- (c) A request for an ethics advisory, ethics decision, or legal ethics opinion shall present in detail to the executive director or assistant executive director all operative facts upon which the request is based. All requests for either a legal ethics opinion or an ethics decision shall be made in writing.
- (d) Any citizen may request either a legal ethics opinion or an ethics decision through any councilor of the judicial district of his or her residence or principal place of business except when the request is regarding

the propriety of said councilor's conduct, in which case the citizen may make the request through another councilor in the district or a councilor in an adjoining judicial district.

(e) Any attorney, including a councilor acting pursuant to paragraph(d) hereinabove, who requests either a legal ethics opinion or an ethics decision concerning acts or contemplated professional conduct of another attorney, shall state the name of that attorney and identify all persons who the requesting attorney has reason to believe would be substantially affected by the question or questions advanced. The councilor shall exercise good faith in preparing the request on behalf of the citizen.

(f) If an attorney willfully fails to identify an attorney who the requesting attorney has reason to believe would be substantially affected by the requested ethics advisory, legal ethics opinion, or ethics decision, his or her willful failure may be treated as misconduct. The requesting attorney shall receive no right, benefit, or immunity under any opinion which has been issued under such circumstances, and the opinion shall be reexamined *de novo* under the procedures delineated in Rule .0104 of this subchapter.

##### .0103 Ethics Advisories

(a) An ethics advisory answers an inquiry by an attorney regarding his or her own contemplated conduct when the attorney needs an expeditious ethics ruling on either a routine matter or under exigent circumstances and has complied with Rule .0102 of this subchapter.

(b) Upon receipt of either a written or verbal request from an attorney for an ethics advisory, the executive director or the assistant executive director, acting under the supervision and direction of the committee, may either honor the request or deny it. If the executive director or assistant executive director honors the request, he or she shall communicate the ruling to the inquirer. The action on the request shall be either written or verbal with prompt confirmation in writing. Action on the request shall be taken within a reasonable time. Neither the denial nor issuance of an advisory nor the ruling itself shall be appealable.

(c) An ethics advisory issued by the executive director or assistant executive director shall be promulgated under the authority of the committee and in accordance with such guidelines as the committee may establish and prescribe from time to time.

(d) An ethics advisory shall sanction or disapprove only the matter in issue, not otherwise serve as precedent and not be published.

(e) Ethics advisories shall be reviewed periodically by the committee. If, upon review, a majority of the committee present and voting decides that an ethics advisory should be withdrawn, the requesting attorney shall be notified in writing of the committee's decision by the executive director or assistant executive director. Until such notification, the attorney shall be deemed to have acted ethically and in good faith if he or she acts pursuant to the ethics advisory which is later withdrawn.

(f) An attorney requesting a legal ethics opinion or ethics decision, subsequent to requesting an ethics advisory on the same question, shall state that an advisory was sought, specify the nature of the advisory provided, and attach copies of all relevant correspondence between the attorney and the Bar.

(g) If the executive director or the assistant executive director declines to issue an ethics advisory, or the requesting attorney disagrees with the issued advisory, or the advisory is withdrawn by the committee, an attorney has the right to proceed *de novo* under the procedures delineated in Rule .0104 of this subchapter.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.0104 Legal Ethics Opinions and Decisions**

(a) Requests for legal ethics opinions or ethics decisions shall be made in writing and submitted to the executive director or assistant executive director who, after determining that the request is in compliance with Rule .0102 of this subchapter, shall transmit the requests to the chairperson of the committee.

(b) If a legal ethics opinion or ethics decision is requested concerning contemplated or actual conduct of another attorney, the chairperson shall notify that attorney and provide him or her with the opportunity to be heard, along with the person who requested the opinion, under such guidelines as may be established by the committee. The chairperson shall notify any additional person or group he or she deems appropriate and provide them an opportunity to be heard.

(c) The committee shall prepare a written proposed legal ethics opinion or ethics decision which shall state its conclusion in respect to the question asked and the reasons therefor.

(d) The proposed legal ethics opinion or ethics decision shall be provided to the interested persons and shall be transmitted to the president for consideration by the council.

(e) At least 30 days prior to the next regularly scheduled meeting of the council, any interested person or group may submit a written request to be heard on the proposed opinion or decision. The council, under such guidelines as it may adopt, may in its discretion allow or deny such request. Any attorney, whether permitted to appear before the council or not, has the right to file a written brief with the council under such rules as may be fixed by the council. The president may, in his or her discretion, permit any additional person or group to file a written brief.

(f) The council's action on the proposed opinion shall be determined by vote of the majority of the council present and voting. Notice of such action shall be provided to the interested persons.

(g) The committee may on its own motion submit a proposed legal ethics opinion to the council for its consideration. Prior to action by the council, the proposed opinion shall be published and an opportunity shall be provided for interested persons to request to be heard before the council when the opinion is considered, subject to the provisions of Rule .0104(e) above.

(h) A legal ethics opinion or ethics decision may be reconsidered or withdrawn by the council pursuant to rules which it may establish from time to time. Those persons who participated in the original proceedings shall be given an opportunity to request to be heard in connection with the reconsideration in accordance with Rule .0104(e) above.

(i) When an ethics inquiry may amount to the statement of a grievance, the executive director, the assistant executive director, the chairperson, or the president may either consider the request as seeking an ethics ruling or refer the matter to the Grievance Committee.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

## **Section .0200 Procedures for the Consumer Protection Committee**

### **.0201 General Provisions**

The purpose for establishing a committee on the unauthorized practice of law (the Consumer Protection Committee) and the reason for the prohibition against the practice of law by those who have not been examined, found qualified to practice law, and licensed to practice law is to protect the public from being advised and represented in legal matters by unqualified persons over whom the judicial department can exercise little, if any, control in the matter of infractions of the Rules of Professional Conduct, which in the public interest, lawyers are bound to observe.

History Note: Statutory Authority G.S. 84-37 Readopted Effective December 8, 1994

### **.0202 Procedure**

(a) The procedure to prevent and restrain the unauthorized practice of law shall be in accordance with the provisions hereinafter set forth.

(b) District bars shall not conduct separate proceedings into unauthorized practice of law matters but shall assist and cooperate with the North Carolina State Bar in reporting and investigating matters of alleged unauthorized practice of law.

History Note: Statutory Authority G.S. 84-37

Readopted Effective December 8, 1994

### **.0203 Definitions**

Subject to additional definitions contained in other provisions of this chapter, the following words and phrases, when used in this article, shall have, unless the context clearly indicates otherwise, the meanings given to them in this rule.

(1) Appellate division - the appellate division of the General Court of Justice.

(2) Chairperson of the Consumer Protection Committee - the councilor appointed to serve as chairperson of the Consumer Protection Committee of the North Carolina State Bar.

(3) Complainant or the complaining witness - any person who has complained of the conduct of any person, firm or corporation as relates to alleged unauthorized practice of law.

(4) Complaint - a formal pleading filed in the name of the North Carolina State Bar in the superior court against a person, firm or corporation after a finding of probable cause.

(5) Council - the Council of the North Carolina State Bar.

(6) Councilor - a member of the Council of the North Carolina State Bar.

(7) Counsel - the counsel of the North Carolina State Bar appointed by the council.

(8) Court or courts of this state - a court authorized and established by the Constitution or laws of the state of North Carolina.

(9) Defendant - any person, firm or corporation against whom a complaint is filed after a finding of probable cause.

(10) Investigation - the gathering of information with respect to alleged unauthorized practice of law.

(11) Investigator - any person designated to assist in investigation of alleged unauthorized practice of law.

(12) Letter of caution - a communication from the Consumer Protection Committee to any person stating that past conduct of the person, while not the basis for formal action, is questionable as relates to the practice of law or may be the basis for injunctive relief if continued or repeated.

(13) Letter of notice - a communication to an accused individual or corporation setting forth the substance of alleged conduct involving unauthorized practice of law.

(14) Office of the counsel - the office and staff maintained by the Counsel of the North Carolina State Bar.

(15) Office of the secretary - the office and staff maintained by the secretary of the North Carolina State Bar.

(16) Party - after a complaint has been filed, the North Carolina State Bar as plaintiff and the accused individual or corporation as defendant.

(17) Plaintiff - after a complaint has been filed, the North Carolina State Bar.

(18) Preliminary Hearing - hearing by the Consumer Protection Committee to determine whether probable cause exists.

(19) Probable Cause - a finding by the Consumer Protection Committee that there is reasonable cause to believe that a person or corporation is guilty of unauthorized practice of law justifying legal action against such person or corporation.

(20) Secretary - the secretary of the North Carolina State Bar.

(21) Supreme Court - the Supreme Court of North Carolina.

History Note: Statutory Authority G.S. 84-37

Readopted Effective December 8, 1994

#### **.0204 State Bar Council - Powers and Duties**

The Council of the North Carolina State Bar shall have the power and duty

(1) to supervise the administration of Consumer Protection Committee in accordance with the provisions hereinafter set forth;

(2) to appoint a counsel. The counsel shall serve at the pleasure of the council. The counsel shall be a member of the North Carolina State Bar but shall not be permitted to engage in the private practice of law.

History Note: Statutory Authority G.S. 84-37

Readopted Effective December 8, 1994

#### **.0205 Chairperson of the Consumer Protection Committee - Powers and Duties**

(a) The chairperson of the Consumer Protection Committee shall have the power and duty

(1) to supervise the activities of the counsel;

(2) to recommend to the Consumer Protection Committee that an investigation be initiated;

(3) to recommend to the Consumer Protection Committee that a complaint be dismissed;

(4) to direct a letter of notice to an accused person or corporation;

(5) to notify the accused and any complainant that a complaint has been dismissed;

(6) to call meetings of the Consumer Protection Committee for the purpose of holding preliminary hearings;

(7) to issue subpoenas in the name of the North Carolina State Bar or direct to the secretary to issue such subpoenas;

(8) to administer oaths or affirmations to witnesses;

(9) to file and verify complaints and petitions in the name of the North Carolina State Bar.

(b) The president, vice-chairperson or senior council member of the Consumer Protection Committee shall perform the functions of the chairperson of the Consumer Protection Committee in any matter when the chairperson is absent or disqualified.

History Note: Statutory Authority G.S. 84-37

Readopted Effective December 8, 1994

#### **.0206 Consumer Protection Committee - Powers and Duties**

The Consumer Protection Committee shall have the power and duty

(1) to direct to the counsel to investigate any alleged unauthorized practice of law by any person, firm, or corporation in the State of North Carolina;

(2) to hold preliminary hearings, find probable cause, and direct that complaints be filed;

(3) to dismiss complaints upon a finding of no probable cause;

(4) to issue a letter of caution to an accused in cases wherein unauthorized practice of law is not established but the activities of the accused are deemed to be improper or may become the basis for unauthorized practice of law if continued or repeated.

(5) to issue advisory opinions in accordance with procedures adopted by the council as to whether the actual or contemplated conduct of non-lawyers would constitute the unauthorized practice of law in North Carolina.

History Note: Statutory Authority G.S. 84-37

Readopted Effective December 8, 1994

#### **.0207 Counsel - Powers and Duties**

The counsel shall have the power and duty

(1) to investigate all matters involving alleged unauthorized practice of law whether initiated by the filing of complaint or otherwise.

(2) to recommend to the chairperson of the Consumer Protection Committee that a matter be dismissed because the complaint is frivolous or falls outside the council's jurisdiction; that a letter of notice be issued; or

that the matter be passed upon by the Consumer Protection Committee to determine whether probable cause exists;

(3) to prosecute all unauthorized practice of law proceedings before the Consumer Protection Committee and the courts;

(4) to represent the North Carolina State Bar in any trial or other proceedings concerned with the alleged unauthorized practice of law;

(5) to appear on behalf of the North Carolina State Bar at hearings conducted by the Consumer Protection Committee or any other agency or court concerning any motion or other matter arising out of an unauthorized practice of law proceeding;

(6) to employ assistant counsel, investigators, and other administrative personnel in such numbers as the council may from time to time authorize;

(7) to maintain permanent records of all matters processed and the disposition of such matters;

(8) to perform such other duties as the council may from time to time direct.

History Note: Statutory Authority G.S. 84-37

Readopted Effective December 8, 1994

### **Section .0300 Disaster Response Plan**

#### **.0301 The Disaster Response Team**

(a) The disaster response team should be made up of the following:

(1) the president of the North Carolina State Bar, or in the event the president is unavailable, the president-elect;

(2) the counsel or his or her designee;

(3) the director of communications or his or her designee;

(4) the president of the Young Lawyers Division of the North Carolina Bar Association ("YLD") or his or her designee;

(5) other persons, such as the applicable local bar president(s), appointed by the president as appropriate and necessary for response in each individual situation.

(b) Implementation of the disaster response plan shall be the decision of the president or president-elect.

(c) The counsel, or his or her designee, shall be the coordinator of the disaster response team ("coordinator"). If the president or president-elect is unavailable to decide whether to implement the disaster response plan for a particular event, then and only then shall the coordinator be authorized to make the decision to implement the disaster response plan.

(d) It shall be the responsibility of the coordinator to conduct annual educational programs regarding the disaster response plan.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### **.0302 General Policy and Objectives**

(a) Rapid Response

(1) It is essential that the State Bar establish an awareness and sensitivity to disaster situations.

(2) The disaster response plan will be disseminated through the publications of the State Bar and continuing legal education programs.

(3) The disaster response team shall be properly trained to respond to initial inquiries and appear at the site.

(4) The disaster response team will provide victims and/or their families with written materials when requested.

(b) Effective Mobilization of Resources

(1) An appropriate press release shall be prepared and disseminated.

(2) The coordinator shall confirm the individuals who will make up the disaster response team.

(3) Individual assignments of responsibilities shall be made to members of the team by the coordinator.

(4) The coordinator shall arrange for the State Bar to be represented at any victims' assistance center established at the disaster site. The

coordinator will request the YLD to assist the State Bar by providing additional staffing.

(5) The coordinator shall contact the local district attorney(s) and request that he or she prosecute any persons engaging in the unauthorized practice of law (N.C.G.S. 84-2.1, 84-4, 84-7 and 84-8); improper solicitation (N.C.G.S. 84-38); division of fees (N.C.G.S. 84-38); and/or the common law crime of barratry (frequently stirring up suits and quarrels between persons).

(c) Publicity

(1) It is important to focus on the fact that disaster response is a public service effort.

(2) The disaster response team shall ensure approval and dissemination of an even-handed press release.

(3) The director of communications will be utilized for press contacts.

(4) It is important to ensure that the press release indicates that the State Bar is a resource designed to assist victims, if requested.

(d) On-site Representation

(1) It is normally desirable for the disaster response team to arrive at the site of the disaster as soon as possible.

(2) Only the president or president-elect or their designee will conduct press interviews on behalf of the State Bar.

(3) The availability of the State Bar at the site of the disaster should be made known to victims.

(4) The disaster response team shall establish a liaison with the State Emergency Management Division, Red Cross, Salvation Army, and other such organizations to provide assistance to victims and furnish written materials to these organizations.

(5) It is crucial that the State Bar not become identified with either side of any potential controversy.

(6) All members of the disaster response team must avoid making comments on the merits of claims that may arise from the disaster.

(e) Dissemination of Information to Affected Individuals

(1) The team shall emphasize in all public statements that the State Bar's major and only legitimate concern is for those persons affected by the disaster and the public interest.

(2) The State Bar's role is limited to monitoring compliance with its disciplinary rules, to requesting reports of any violation needing investigation, and to informing victims of rules concerning client solicitation.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.0303 Report on Results**

(a) The coordinator will convene as soon as possible a meeting to be attended by as many groups as were involved in the disaster to obtain input regarding the effectiveness of the plan in that particular disaster.

(b) The coordinator shall prepare a written report of all that occurred at the site of the disaster.

(c) The written report shall be submitted to the council of the State Bar as well as other involved organizations.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

## **Section .0400 Rules and Regulations Relating to the Appointment of Counsel for Indigent Defendants in Certain Criminal Cases**

### **.0401 Authority**

These rules and regulations are issued pursuant to the authority contained in G.S. 7A-459, Chapter 1013 of the Session Laws of 1969.

History Note: Statutory Authority G.S. 7A-459

Readopted Effective December 8, 1994

### **.0402 Determination of Indigency**

(a) Prior to the appointment of counsel on grounds of indigency, the court shall require the defendant to complete and sign under oath an affidavit of indigency in a form approved by the director of the Administrative Office of the Courts.

(b) Prior to the call of the case for trial, the judge shall make reasonable inquiry of the defendant personally under oath to determine the truth of the statements made in the affidavit of indigency.

(c) The defendant's affidavit of indigency shall be filed in the records of the case.

(d) Upon the basis of the defendant's affidavit of indigency, his statements to the court on this subject, and such other information as may be brought to the attention of the court which shall be made a part of the record in the case, the court shall determine whether or not the defendant is in fact indigent.

History Note: Statutory Authority G.S. 7A-459

Readopted Effective December 8, 1994

### **.0403 Waiver of Counsel**

(a) Any defendant desiring to waive the right to counsel as provided in G.S. 7A-457 shall complete and sign under oath a waiver of counsel in a form approved by the director of the Administrative Office of the Courts. If such defendant waives the right to counsel but refuses to execute such waiver, the court shall so certify in a form approved by the director of the Administrative Office of the Courts.

(b) Prior to the call of the case for trial, the judge shall make reasonable inquiry of the defendant personally to determine that the defendant has understandingly waived his or her right to counsel.

(c) The judge, upon being so satisfied, shall accept the waiver of counsel executed by the defendant, sign the same, and cause it to be filed in the record of the case.

History Note: Statutory Authority G.S. 7A-459

Readopted Effective December 8, 1994

### **.0404 Appointment of Counsel**

(a) The North Carolina State Bar shall adopt a model plan for the appointment of counsel for indigent persons charged with certain crimes or otherwise entitled to representation. Each judicial district bar shall adopt a plan or plans for the appointment of counsel by the public defender and/or the court to represent indigent persons which provides for the appointment of experienced counsel for persons charged with serious crimes, with respect to which the model plan may serve as a guide or example. A plan may be applicable to the entire district, or, at the election of the district bar, separate plans may be adopted by the district bar for use in each separate county within the district.

(b) Such plan or plans as adopted by the judicial district bar shall be certified to the council of the North Carolina State Bar for its approval, following which the plan or plans shall be certified to the clerk of superior court of each county to which each plan is applicable by the secretary of the North Carolina State Bar and shall constitute the method by which counsel shall be selected in said district for appointment to indigent defendants. Thereafter all appointments of counsel for indigent defendants in said district shall be made in conformity with such plan or plans, unless the trial judge or, where authorized, the public defender, in the exercise of his or her discretion deems it proper in furtherance of justice to appoint as counsel for an indigent defendant or defendants some lawyer or lawyers residing and practicing in the judicial district who is or are not on the plan or list certified to the clerk of superior court, and if so, the trial judge or, where authorized, the public defender, may appoint as counsel to represent an indigent defendant some lawyer or lawyers not on said plan or list residing and practicing in the judicial district.

(c) No attorney shall be appointed as counsel for an indigent defendant in a court of any district except the district in which he or she resides or maintains an office except by consent of counsel so appointed.

(d) No indigent defendant shall be entitled or permitted to select or specify the attorney who shall be assigned to defend him or her.

(e) The clerk of superior court of each county shall file or record in his or her office, maintain and keep current the plan for the assignment of counsel applicable to said county as certified to him by the secretary of the North Carolina State Bar.

(f) The clerk of superior court of each county shall keep a record of all counsel eligible for appointment under the plan applicable to said county as certified to him or her by the secretary of the North Carolina State Bar.

(g) Orders for the appointment of counsel shall be entered by the court in a form approved by the director of the Administrative Office of the Courts.

(h) Notwithstanding any other provision of this section or any plans or assigned counsel lists adopted by a district bar pursuant thereto, two counsel shall be appointed to represent an indigent defendant charged with murder where the state is seeking the death penalty.

(i) (1) Notwithstanding any other provisions of this section or any plans or assigned counsel lists adopted by a district bar pursuant thereto, no attorney shall be appointed to represent at the trial level any indigent defendant charged with a capital crime

(A) who does not have a minimum of five years of experience in the general practice of law, provided that the court or, where authorized, the public defender, may in its or his or her discretion appoint as assistant counsel an attorney who has less experience;

(B) who has not been found by the court or, where authorized, the public defender, appointing him to have a demonstrated proficiency in the field of criminal trial practice.

(2) For the purpose of this section the term general practice of law shall be deemed to include service as a prosecuting attorney in any district attorney's office.

(j) (1) Notwithstanding any other provision of this section or any plans or assigned counsel lists adopted by a district bar pursuant thereto, no attorney shall be appointed to represent at the appellate level any indigent defendant convicted of a capital crime

(A) who does not have a minimum of five years of experience in the general practice of law, provided, that the court or, where authorized, the public defender, may in its or his or her discretion appoint as assistant counsel an attorney who has less experience;

(B) who has not been found by the trial judge or, where authorized, the public defender, to have a demonstrated proficiency in the field of appellate practice.

(2) For the purpose of this section the term general practice of law shall be deemed to include service as a prosecuting attorney in any district attorney's office.

(3) Unless good cause is shown, an attorney representing the indigent defendant at the trial level shall represent him or her at the appellate level if the attorney is otherwise qualified under the provisions of this section.

(k) In those cases in which a public defender has authority to appoint a member of a judicial district bar to represent an indigent person, the public defender shall make the appointment pursuant to the procedures set out herein.

(l) It is contemplated that in those districts with a public defender, additional outside counsel will be appointed in those instances in which the volume of work handled by the public defender necessitates additional counsel and in those instances where a conflict of interest exists as regards the public defender and multiple defendants. Provided, when a conflict of interest on the part of the public defender necessitates additional counsel, the court shall appoint outside counsel.

(m) Nothing in these regulations or in the model plan shall be construed to prohibit assignment of otherwise qualified counsel to represent indigent defendants pursuant to specialized programs, plans or contracts which may be implemented from time to time to improve efficiency and

economy where such programs, plans or contracts are consistent with the ends of justice and are approved by the Council of the North Carolina State Bar.

History Note: Statutory Authority G.S. 7A-459

Readopted Effective December 8, 1994

#### **.0405 Withdrawal by Counsel**

(a) At any time during or pending the trial or retrial of a case, the trial judge, the appointing judge, or the resident judge of the district, upon application of the attorney, and for good cause shown, may permit said attorney to withdraw from the defense of the case.

(b) At any time after the trial of a case and during the pendency of an appeal, the trial attorney, for good cause shown, may apply to the appellate court for permission to withdraw from the defense of the case upon the appeal.

(c) Applications for permission to withdraw as counsel shall be made only for good cause where compelling reasons or actual hardship exists.

History Note: Statutory Authority G.S. 7A-459

Readopted Effective December 8, 1994

#### **.0406 Procedure for Payment of Compensation**

(a) Upon completion of the representation of an indigent defendant by appointed counsel in the trial court, the trial judge shall, upon application, enter an order allowing such compensation as is provided in G.S. 7A-458.

(b) Upon the completion of any appeal, the trial judge, the resident judge or the judge holding the courts of the district, shall, upon application, enter a supplemental order in the cause allowing the appointed attorney upon the appeal such additional compensation as may be appropriate.

(c) Orders for the payment of compensation to counsel for representation of indigent defendants shall be entered by the judge in a form approved by the director of the Administrative Office of the Courts.

(d) Two certified copies of the order for the payment of fees shall be forwarded by the clerk of the superior court to the Administrative Office of the Courts, Attention: Assistant Director, Raleigh, North Carolina, for payment.

(e) Upon the entry of the order for the payment of counsel fees, the court shall upon final conviction likewise enter a judgment against the defendant for whom counsel was assigned in the amount allowed as counsel fees, said judgment to be in the form approved by the director of the Administrative Office of the Courts.

(f) Counsel appointed for the representation of indigent defendants shall not accept any compensation other than that awarded by the court.

History Note: Statutory Authority G.S. 7A-459

Readopted Effective December 8, 1994

### **Section .0500 Model Plan for Appointment of Counsel for Indigent Defendants in Certain Criminal Cases**

#### **.0501 Purpose**

The purpose of these regulations is to provide for effective representation of indigent criminal defendants at all stages of trial and appellate proceedings.

History Note: Statutory Authority G.S. 7A-459

Readopted Effective December 8, 1994

#### **.0502 Applicability**

These regulations apply to any criminal case arising in the \_\_\_\_\_ Judicial District in which the court has determined that the defendant is entitled to the appointment of counsel. Reference to the singular shall, as appropriate, be construed to include the plural.

History Note: Statutory Authority G.S. 7A-459

Readopted Effective December 8, 1994

### **.0503 Lists of Attorneys**

(a) Any attorney engaged in the private practice of law primarily in the judicial district who

(1) maintains an office in the judicial district;

(2) practices criminal law in the courts of the \_\_\_\_\_ Judicial District to an appreciable extent, or intends or desires to do so, may be placed on one of three lists governing the appointment of counsel in criminal cases involving indigent persons. No other attorneys will be placed on the lists.

(b) Attorneys included on the first list may only be appointed to represent defendants charged with misdemeanors or felonies punishable by imprisonment for not more than five years.

(c) Attorneys on the second list may be appointed to represent defendants charged with misdemeanors or felonies other than capital crimes, provided that an attorney may request the Committee on Indigent Appointments that he not be subject to appointment to represent defendants charged only with misdemeanors. If the committee approves the request, the list shall reflect the limited availability of that attorney for appointments.

(d) Attorneys on the third list may be appointed to represent defendants charged with any crimes, provided that an attorney may request the Committee on Indigent Appointments that he or she not be subject to appointment to represent defendants charged only with misdemeanors. If the committee approves the request, the list shall reflect the limited availability of that attorney for appointments.

(e) The Committee on Indigent Appointments shall, prior to the effective date of these regulations, meet and develop three lists of attorneys of the types described herein from the roster of attorneys currently accepting appointments in indigent cases in the \_\_\_\_\_ Judicial District. The first list shall include all such attorneys who have been licensed less than two years or who have been admitted by comity. The second list shall include all such attorneys who have been licensed for two years or more. The third list shall include all such attorneys who have had not less than five years experience in the general practice of law and who have demonstrated proficiency in the field of criminal trial practice. With respect to these initial lists, any other requirement not otherwise met by any listed attorney is hereby waived unless the committee determines that it ought not to be waived.

(f) Subject to the exceptions contained in Rule .0503(e) above, requirements for inclusion on the three lists are as follows:

(1) an attorney licensed to practice law in North Carolina may be included on the first list if the Committee on Indigent Appointments finds that

(A) the attorney is competent to represent criminal defendants charged with misdemeanors and felonies;

(B) two attorneys who have engaged in the practice of law in the \_\_\_\_\_ Judicial District for not less than three years preceding the committee's consideration, at least one of whom being included on one of the three lists, have stated in writing that they believe he or she is competent to represent criminal defendants charged with misdemeanors and felonies and that they recommend that he or she be included on the list, provided that the recommending attorneys may not be members of the petitioning attorney's law firm at the time of recommendation.

(2) an attorney who has been licensed to practice law in North Carolina for not less than two years or who has been admitted to the North Carolina State Bar by comity may be included on the second list if the committee finds that

(A) the attorney has demonstrated proficiency in the field of criminal trial practice and has the ability to handle appellate matters;

(B) two attorneys who have engaged in the private practice of law in the \_\_\_\_\_ Judicial District for not less than four years pre-

ceding the committee's consideration, at least one of whom being included on one of the three lists, have stated in writing that they believe he or she is competent to represent criminal defendants charged with felonies and that they recommend that he or she be included on the list, provided that the recommending attorneys may not be members of the petitioning attorney's law firm at the time of recommendation;

(C) the attorney is competent to represent criminal defendants charged with felonies.

(3) an attorney who has been licensed to practice law in North Carolina for not less than five years may be included on the third list if the committee finds that

(A) the attorney has demonstrated proficiency in the field of criminal trial practice and has the ability to handle appellate matters;

(B) two attorneys who have engaged in the private practice of law in the \_\_\_\_\_ Judicial District for not less than five years preceding the committee's consideration, at least one of whom being included on one of the three lists, have stated in writing that they believe he or she is competent to represent defendants charged with capital crimes and that they recommend that he or she be included on the third list, provided that the recommending attorneys may not be members of the petitioning attorney's law firm at the time of recommendation;

(C) the attorney has not less than five years' experience in the general practice of law, provided that the term "general practice of law" shall be deemed to include service as a prosecuting attorney in any district attorney's office;

(D) the attorney is competent to represent criminal defendants charged with capital crimes.

(g) The Committee on Indigent Appointments shall review the lists not less than once a year to ensure that the lists are current and that the attorneys whose names appear on the lists meet the qualifications set out herein.

History Note: Statutory Authority G.S. 7A-459

Readopted Effective December 8, 1994

### **.0504 Committee on Indigent Appointments**

(a) A Committee on Indigent Appointments is hereby established to assist in the implementation of these regulations. The committee shall have authority to act when the regulations become effective.

(b) All members of the committee shall be attorneys who

(1) are included on one of the appointment lists;

(2) have practiced criminal law in the judicial district, whether as a prosecutor or defense counsel, for not less than five years;

(3) are knowledgeable about practicing attorneys in the \_\_\_\_\_ Judicial District.

(c) The committee shall consist of members appointed by the president of the judicial district bar. At least one member shall be appointed from each county in the district. Members of the committee shall be appointed for terms of two years, except that initially a minority of the members shall be designated to serve one year terms in order to stagger terms. The appointments shall be made by letter, a copy of which shall be maintained in the records of the committee. No member shall serve two consecutive terms, except that a person who has been appointed to replace a member who did not complete his term may be appointed to a full term following his completion of the partial term. Any member who resigns or otherwise becomes ineligible to continue serving as a member shall be replaced for his term as soon as practicable.

(d) The president of the judicial district bar shall appoint one of the members as chairperson of the committee, who shall serve at the pleasure of the president as shall all other members of the committee.

(e) The committee shall meet at the call of the chairperson upon reasonable notice. The first meeting shall be on \_\_\_\_\_. Thereafter, the committee shall meet as often as is necessary to dispatch its business.

(f) The committee shall have complete authority to accomplish the following:

(1) supervise the administration of these regulations;

(2) review requests from attorneys concerning their placement on any list and obtain information pertaining to such placement;

(3) approve or disapprove an attorney's addition to or deletion from any list or the transfer of any attorney from one list to another, provided that an attorney's request to be deleted from a list or transferred to a lower numbered list shall not require committee approval;

(4) establish procedures with which to carry out its business;

(5) interview attorneys seeking placement on any list and witnesses for or against such placement.

(g) A majority of the committee must be present at any meeting in order to constitute a quorum. The committee may take no action unless a quorum is present. A majority vote in favor of a motion or any proposed action shall be required in order for the motion to pass or for the action to be taken.

(h) The committee shall meet in private, except it may invite persons to make limited appearances to be interviewed. Discussions of the committee, its records, and its actions shall be treated as confidentially as possible. The names of the members of the committee shall not be confidential.

History Note: Statutory Authority G.S. 7A-459

Readopted Effective December 8, 1994

#### **.0505 Placement of Attorneys on List**

(a) Any attorney who wishes to have his or her name added to or deleted from any list, or to have his or her name transferred from one list to another, shall file a written request with the administrator. The request shall include information that will facilitate the committee's determination whether the attorney meets the standards set forth in Rule .0503 above for placement on a certain list. The written statements of competency required by Rule .0503 above must be attached to the request.

(b) The administrator shall maintain records for the committee and shall advise each member of the committee of the name of the requesting attorney and the nature of this request before the committee meets to review the request. The administrator shall assure that all requests properly filed are brought to the committee's attention at the next meeting at which it is practicable for the committee to review the request.

(c) The administrator shall assure that all district court judges, resident superior court judges, any special superior court judge with a permanent office in the judicial district, and the district attorney for the \_\_\_\_\_ Judicial District, and the district's public defender, if any, are advised of any request concerning placement on any list so that such officials will have an opportunity to comment on the request to the committee.

(d) When the committee meets to review placement requests, it may require any requesting attorney to appear before it to be interviewed and may require information in addition to that submitted in the request. Any member of the committee may discuss requests with other members of the bar in a confidential manner and may relate information obtained thereby to the other members. Rules of evidence do not apply with respect to the review of requests. The committee may hold a request in abeyance for a reasonable period of time while obtaining additional information.

(e) The committee shall determine whether an attorney requesting to be added to a list when he or she is not currently on any list or to be transferred from a lower numbered list to a higher numbered list (such as from the first list to the second list) meets all the applicable standards set out in Rule .0503 above. The request shall be granted or the addition or transfer allowed if the committee finds that he or she does meet all the standards. Conversely, the request shall be denied if the committee does

not find that he or she meets all the standards. The findings shall be reduced to writing and kept in the regular records of the committee by the administrator. The committee shall assure that the requesting attorney is given prompt notice of the action taken with respect to his or her request and is advised of the basis for denial if the request is not granted.

(f) If at any time it reasonably appears to the committee that an attorney no longer meets a standard set forth in Rule .0503 above for the list on which he or she is placed or that he or she can no longer meet the responsibilities of representing indigent defendants with respect to such list, the committee shall direct the attorney to show cause why he or she should not be deleted from the list or transferred from a higher numbered list to a lower numbered list. If the attorney cannot show sufficient cause, the committee may take appropriate action, including suspending the attorney from receiving appointments in indigent cases for a definite or indefinite time, or deleting his or her name from the list he or she is on, or transferring him or her from a higher numbered list to a lower numbered list. Appropriate written findings shall be made by the committee in this regard, and the attorney shall be informed of the basis of any action taken.

(g) An attorney whose name is deleted from a list or who is transferred to another list by the committee may appeal the committee's action to the senior resident superior court judge of the \_\_\_\_\_ Judicial District. In such a case the resident superior court judge will make the final decision regarding the deletion or transferral of the attorney.

(h) Whenever an attorney who provides information to the committee, collectively or through any member, requests that his or her name not be used or that his or her information be treated confidentially, his or her request shall be granted unless doing so results in manifest unfairness.

History Note: Statutory Authority G.S. 7A-459

Readopted Effective December 8, 1994

#### **.0506 Appointment Procedure (Noncapital Cases)**

(a) The administrator shall provide the clerk in each courtroom in the district and superior criminal courts of the \_\_\_\_\_ Judicial District with current lists of attorneys subject to appointment in indigent cases. Attorneys shall be appointed only in accordance with the lists on which they appear and only in cases to be tried in counties in which they maintain offices unless they agree in advance to accept cases from other counties.

(b) Each courtroom clerk shall maintain a record of attorneys subject to appointment to represent indigents. Beside each attorney's name shall appear the number of any list he or she is on. The court shall proceed in alphabetical sequence in appointing attorneys. If an attorney's name is passed over because he or she is not on a list relating to a particular charge, the court shall return to his or her name for the next appointment consistent with his or her lists. The court may pass over the name of any attorney known not to be reasonably available because of vacation, illness, or other reasons.

(c) In its discretion, the court may appoint an attorney in any case without regard to sequence or an attorney not maintaining an office in the county where the case is to be tried.

(d) The clerk shall provide notice of the appointment to the attorney concerned as soon as possible. Further, the clerk shall advise the defendant of the name of his or her attorney.

(e) The court may appoint an attorney to represent more than one defendant in a single case.

(f) In those cases in which the public defender cannot serve, and is authorized to appoint a substitute member of the bar to represent an indigent defendant, the public defender shall consult the current lists of attorneys subject to appointment in indigent cases maintained by the court administrator and referred to in Rule .0503 above and shall appoint the next eligible attorney on the list. The public defender shall proceed in sequence in appointing attorneys but may pass over the name of any attorney known to be unavailable because of vacation, illness, or other reasons, or, in his or her discretion, where justice so requires.

(g) If a judge is not reasonably available to appoint counsel to represent an indigent defendant, the clerk of court shall appoint the next eligible attorney on the list. Appointments of counsel by the clerk shall be subject to review and approval by the judge.

History Note: Statutory Authority G.S. 7A-459

Readopted Effective December 8, 1994

#### **.0507 Appointments in Capital Cases**

(a) In addition to the provisions of Rule .0506 above, the provisions of this rule shall apply to the appointment of counsel in capital cases.

(b) A counsel and an assistant counsel shall be appointed to represent an indigent defendant charged with murder, in cases in which the state is seeking the death penalty. The assistant counsel may be on the second list or the third list of attorneys.

(c) (1) No attorney shall be appointed to represent at the trial level any indigent defendant charged with a capital crime

(A) who has less than five years' experience in the general practice of law, provided that the court may, in its discretion, appoint as assistant counsel an attorney who has less experience; or

(B) who has not been found by the court appointing him or her to have a demonstrated proficiency in the field of criminal trial practice.

(2) For the purpose of this section, the term "general practice of law" shall be deemed to include service as a prosecuting attorney in any district attorney's office.

History Note: Statutory Authority G.S. 7A-459

Readopted Effective December 8, 1994

#### **.0508 Appellate Appointments**

(a) If a criminal defendant who has given notice of appeal from a conviction is found to be eligible, because of indigency, for appointment of counsel at the appellate level, the attorney representing the defendant at the trial level may be appointed to represent the defendant at the appellate level. If the attorney representing the defendant at the trial level was retained, he may be appointed to represent the defendant at the appellate level even though he or she does not meet all the requirements of Rule .0503 above or the other pertinent provisions of these regulations. For good cause, the attorney at the trial level may be relieved of responsibility for the appeal. Whenever it is otherwise necessary to appoint an attorney to represent an indigent person at the appellate level, the attorney appointed shall be selected in a manner consistent with appointment of counsel at the trial level. If the trial attorney is not appointed, the appellate defender's office or any other qualified attorney may be appointed, in a manner consistent with these rules, to represent the defendant at the appellate level.

(b) (1) No attorney shall be appointed to represent at the appellate level any indigent defendant convicted of a capital crime

(A) who has less than five years of experience in the general practice of law, provided, however, that the court or, where authorized, the public defender, may, as a matter of discretion, appoint as assistant counsel an attorney who has less experience; or

(B) who has not been found by the court or the public defender to have a demonstrated proficiency in the field of appellate practice.

(2) For the purpose of this section, the term "general practice of law" shall be deemed to include service as a prosecuting attorney in any district attorney's office.

History Note: Statutory Authority G.S. 7A-459

Readopted Effective December 8, 1994

#### **.0509 Administration**

(a) The senior resident superior court judge for the judicial district shall designate a person to serve as administrator of these regulations.

(b) The administrator will perform the duties described previously and particularly shall

(1) maintain records relating to these regulations and to the actions of the Committee on Indigent Appointments;

(2) keep current the three lists of attorneys;

(3) assist the courtroom clerks and the clerk of superior court in carrying out these regulations;

(4) attend meetings of the committee as appropriate;

(5) inform the judges of the district and the district attorney and the members of the committee of requests by attorneys concerning placement on any lists;

(6) perform other administrative tasks necessary to the implementation of these regulations.

(c) The administrator shall have such office, supplies, and equipment as can be provided by the senior resident superior court judge or the committee.

(d) The clerk of superior court of each county in the judicial district shall file and keep current these regulations for the assignment of counsel as certified to him or her by the secretary of the North Carolina State Bar.

(e) The clerk of superior court of each county in the \_\_\_\_\_ Judicial District shall keep a record of all counsel eligible for appointment under these regulations and a permanent record of all appointments made in his or her county.

History Note: Statutory Authority G.S. 7A-459

Readopted Effective December 8, 1994

#### **.0510 Miscellaneous**

(a) These regulations are issued pursuant to Rule .0404, Subchapter D, Chapter 1, Title 27 of the North Carolina Administrative Code in accordance with G.S. 7A-459. Nothing contained herein shall be construed or applied inconsistently with the regulations established by the North Carolina State Bar Council or with other provisions of state law.

(b) It is recognized that the court has the inherent discretionary power in any case to decline to appoint a particular attorney to represent an indigent person. It is also recognized that occasionally the court may determine that the interests of justice would be best served by appointing a particular lawyer to handle a particular case even though he or she is not next in sequence or does not maintain an office in the county where the case is to be tried.

(c) These regulations shall be construed liberally in order to carry out the purpose stated in Rule .0501 above.

(d) These regulations shall become effective on \_\_\_\_\_, and shall supersede any existing regulations or plan concerning the appointment of counsel in indigent cases.

APPROVED AND PROMULGATED THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 199\_\_.

History Note: Statutory Authority G.S. 7A-459

Readopted Effective December 8, 1994

### **Section .0600 Procedures for the Positive Action for Lawyers (PALS) Committee**

#### **.0601 Investigation of Alleged Substance Abuse**

The Positive Action for Lawyers Committee (the committee) shall have jurisdiction to investigate and evaluate allegations of substance abuse by lawyers. Among many other things, the committee may confer with any lawyer who is the subject of such allegations as to such allegations, and make recommendations to such lawyer, should it be determined that he or she in fact has a substance abuse problem, regarding sources of help for such problem.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23

Readopted Effective December 8, 1994

#### **.0602 Investigation of Cases Referred by Disciplinary Bodies**

The committee may perform similar functions as to cases referred to it by a disciplinary body, reporting the results thereof to the referring body.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23

### **.0603 Confidentiality**

Except as noted herein and otherwise required by law, results of investigations, conferences and the like shall be privileged and held in the strictest confidence between the lawyer involved and the committee. For good cause shown where the allegation of substance abuse is made by the lawyer's family, the committee may, in its discretion, release such information to such person or persons as in its judgment will be in the best interest of the lawyer involved.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23

Readopted Effective December 8, 1994

### **.0604 Reference to the Grievance Committee**

Should investigation and evaluation clearly indicate that the lawyer involved is engaging in conduct detrimental to the public, the courts, or the legal profession, the committee shall take such action as may appear appropriate to the committee, including, if warranted, the filing of a grievance.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23; G.S. 84-28

Readopted Effective December 8, 1994

### **.0605 District Committees**

The committee may, under appropriate rules and regulations promulgated by the council, establish district committees, which may exercise any or all of the functions set forth herein to the extent provided in any such rules and regulations.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23

Readopted Effective December 8, 1994

### **.0606 Suspension for Impairment, Reinstatement**

If it appears that an attorney's ability to practice law has been impaired by drug or alcohol use, the committee may petition any superior court judge to issue an order in the court's inherent authority suspending the attorney's license to practice law in this state for up to 180 days.

(a) The petition shall be supported by affidavits of at least two persons setting out the evidence of the attorney's impairment.

(b) The petition shall be signed by the executive director of the committee and the executive director of the North Carolina State Bar.

(c) The petition shall contain a request for a protective order sealing the petition and all proceedings respecting it.

(d) Except as set out in Rule .0606(j) below, the petition shall request the court to issue an order requiring the attorney to appear within 10 days and show cause why the attorney should not be suspended from the practice of law. No order suspending an attorney's license shall be entered without notice and a hearing, except as provided in Rule .0606(j) below.

(e) The order to show cause shall be served upon the attorney, along with the State Bar's petition and supporting affidavits, as provided in Rule 4 of the North Carolina Rules of Civil Procedure.

(f) At the show cause hearing, the State Bar will have the burden of proving by clear, cogent, and convincing evidence that the attorney's ability to practice law has been impaired by drug or alcohol use.

(g) If the court finds that the attorney is impaired, the court may enter an order suspending the attorney from the practice of law for up to 180 days. The order shall specifically set forth the reasons for its issuance.

(h) At any time following entry of an order suspending an attorney, the attorney may petition the court for an order reinstating the attorney to the practice of law.

(i) A hearing on the reinstatement petition will be held no later than 10 days from filing of the petition, unless the suspended attorney agrees to a continuance. At the hearing, the suspended attorney will have the burden of establishing by clear, cogent, and convincing evidence that his or her ability to practice law is not impaired by drug or alcohol use and, if impairment has previously existed, that the threat of impairment from drug or alcohol use has been and is being treated and/or managed to minimize

the danger to the public from a reoccurrence of drug or alcohol impairment.

(j) No suspension of an attorney's license shall be allowed without notice and a hearing unless

(1) the State Bar files a petition with supporting affidavits, as provided in Rule .0606(a)-(c) above.

(2) the State Bar's petition and supporting affidavits demonstrate by clear, cogent, and convincing evidence that immediate and irreparable harm, injury, loss, or damage will result to the public, to the lawyer who is the subject of the petition, or to the administration of justice before notice can be given and a hearing had on the petition.

(3) the State Bar's petition specifically seeks the temporary emergency relief of suspending *ex parte* the attorney's license for up to 10 days or until notice be given and a hearing held, whichever is shorter, and the State Bar's petition requests the court to endorse an emergency order entered hereunder with the hour and date of its entry.

(4) the State Bar's petition requests that the emergency suspension order expire by its own terms 10 days from the date of entry, unless, prior to the expiration of the initial 10-day period, the court agrees to extend the order for an additional 10-day period for good cause shown or the respondent attorney agrees to an extension of the suspension period.

(k) The respondent attorney may apply to the court at any time for an order dissolving the emergency suspension order. The court may dissolve the emergency suspension order without notice to the State Bar or hearing, or may order a hearing on such notice as the court deems proper.

(l) The North Carolina State Bar shall not be required to provide security for payment of costs or damages prior to entry of a suspension order with or without notice to the respondent attorney.

(m) No damages shall be awarded against the State Bar in the event that a restraining order entered with or without notice and a hearing is dissolved.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28(i)

Readopted Effective December 8, 1994

### **.0607 Consensual Suspension**

Notwithstanding the provisions of Rule .0606 of this subchapter, the court may enter an order suspending an attorney's license where the attorney consents to such suspension. The order may contain such other terms and provisions as the parties agree to and which are necessary for the protection of the public.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28(i)

Readopted Effective December 8, 1994

### **.0608 Committee Members As Agents of the State Bar**

All members of the committee shall be deemed to be acting as agents of the North Carolina State Bar and within the course and scope of the agency relationship.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23

Readopted Effective December 8, 1994

### **.0609 Judicial Subcommittee**

A subcommittee to the committee shall be formed which shall consist of at least two members of the judiciary of this state. The purpose of this subcommittee will be to implement a program for intervention for members of the judiciary with substance abuse problems which affect their conduct as judges or justices. The subcommittee will be governed by the rules of the Positive Action for Lawyers Committee where applicable. Rules .0606 and .0607 of this subchapter will have no application to this rule.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23

Readopted Effective December 8, 1994

## **Section .0700 Procedures for the Fee Dispute Arbitration Committee**

### **.0701 Implementation of a Model Plan**

The Fee Arbitration Committee (the committee) shall implement a model plan for fee arbitration approved by the council and shall ensure that a plan of fee arbitration not substantively inconsistent with the model plan is adopted by each district bar not later than January 1, 1994. It is contemplated that fee arbitration plans will differ somewhat from district to district as a function of local conditions and that some district bars may wish to jointly administer fee arbitration programs. All district bar fee arbitration plans must be approved by the committee on behalf of the council.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.0702 Alternative to District Bar-Sponsored Arbitration**

If at any time following January 1, 1994, a district bar does not have in operation a fee arbitration plan approved by the committee, the committee shall have the responsibility of providing fee arbitration services through its own membership, through a fee arbitration committee from another judicial district or through a fee arbitration committee appointed from among persons residing in the subject district. In any such case, the body providing fee arbitration services shall be subject to the procedural requirements set forth in the model plan.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.0703 Coordinator of Fee Arbitration**

The secretary-treasurer of the North Carolina State Bar shall designate a member of his or her staff to serve as coordinator of fee arbitration under the supervision of the committee. The coordinator of fee arbitration shall assist in seeing that fee arbitration services are available in every district of the state. The coordinator shall also develop and make available for use forms for the administration of district bar fee arbitration programs, such forms to be approved by the committee. The coordinator shall also be responsible for maintaining records and statistics relating to the administration of the program and shall assist the chairperson of the committee in developing an annual report concerning the fee arbitration program to the council and the North Carolina Supreme Court.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.0704 Volunteer Committee Service**

Except for the coordinator of fee arbitration, all persons acting on behalf of the committee, on either the state or district bar levels, shall be volunteers and shall be compensated for their services and reimbursed for their expenses as though they were councilors of the North Carolina State Bar engaged in official business of the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

## **Section .0800 Model Plan for District Bar Fee Arbitration**

Note: For the purposes of this model plan, the constituent district bars of the North Carolina State Bar are referred to as "district bars."

### **.0801 Appointment of Committee Members**

(a) The Committee on Fee Arbitration (herein called the committee) shall consist of (not fewer than six nor more than eighteen) members to be appointed by the president of the district bar for three-year terms. At least one committee member shall be appointed from each county in the district. Initially, one-third of the members of the committee shall be appointed for a period of one year, one-third for a period of two years, and one-third for a period of three years. At least one-third but not more than

one-half of the membership of the committee shall be responsible laypersons who reside within the district. All other persons serving on the committee shall be members of this bar. As each member's term of office on the committee expires, his or her successor shall be appointed by the president for a period of three years. The term of a member which expires while an arbitration is pending before him or her or before a panel of which he or she is a member shall be extended until such arbitration is concluded, but such extension shall not interfere with the president's power to appoint a successor to the committee. The president shall appoint the chairperson of the committee each year from among the members, and the name of the chairperson shall be sent to the coordinator of fee arbitration with the North Carolina State Bar.

(b) To the extent reasonably possible, the composition of the committee should reflect the ethnic and cultural diversity of the population of the district and should include members of minority groups, women and senior citizens. Lawyer members should have practiced for at least five years.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.0802 Chairperson**

The chairperson shall be charged with the responsibility of overseeing the work of the committee, reviewing recommendations for dismissal of cases, developing forms to implement the procedure prescribed herein, and formulating rules of procedure not inconsistent with these rules. The chairperson shall review recommendations for dismissal of cases within 30 days after any such recommendations are made.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.0803 Jurisdiction**

The committee shall have jurisdiction over any disagreement concerning the fee paid, charged or claimed for legal services rendered by an attorney licensed to practice in this state and having his or her principal practice in the \_ District where there exists an express or implied contract establishing an attorney-client relationship. Disputes over which, in the first instance, a court or federal or state administrative agency or official has jurisdiction to establish the amount of the fee, or which involve services which constitute a violation of the Rules of Professional Conduct, are specifically excluded from the committee's jurisdiction, as are matters which are already the subject of litigation. Also excluded are disputes between lawyers concerning divisions of legal fees, disputes between lawyers and other service providers such as court reporters and expert witnesses, and disputes between lawyers and other persons in regard to the provision of nonlegal services. It shall be the duty of the committee to encourage the amicable resolution of fee disputes falling within its jurisdiction and, in the event such resolution is not achieved, to arbitrate such disputes.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.0804 Processing Requests for Arbitration**

(a) Any client may submit a request for arbitration of a fee dispute. Lawyers who are parties to fee disputes may not independently request arbitration but are encouraged to advise clients with whom they have fee disputes of the existence of this procedure and its purpose. Such lawyers must also refrain from filing suit to collect disputed fees until their clients have had a reasonable opportunity to request arbitration after having been notified of the existence of this plan.

(b) Requests for fee arbitration shall be submitted in writing to either the coordinator of fee arbitration addressed to the North Carolina State Bar, P.O. Box 25908, Raleigh, NC 27611, or the chairperson of the committee. In the event a request is submitted initially to the chairperson, the chairperson shall forward a copy of the request to the coordinator of fee arbitration to facilitate the maintenance of complete records and any nec-

essary follow-up. No filing fee shall be required. The request should state with clarity and brevity the facts of the fee dispute and the names and addresses of the parties. It should also state that prior to requesting arbitration a reasonable attempt was made to resolve the dispute by agreement, that the matter has not already been adjudicated, and that it is not presently the subject of litigation.

(c) Upon receipt, a request shall be immediately acknowledged. If received initially by the coordinator of fee arbitration, the request shall be immediately forwarded to the chairperson of the committee of the district wherein the dispute arose for referral to an "assigned member" for investigation. The assigned member shall be disqualified from participating in any manner in the arbitration proceedings.

(d) As soon as possible after receiving the case, the assigned member shall notify the subject lawyer of the request for arbitration and provide the lawyer with a copy of the request for arbitration. The assigned member shall personally contact both parties for the purpose of explaining the arbitration procedure and exploring with the parties the possibility of resolving the dispute by agreement prior to a hearing. If settlement does not occur, the assigned member shall undertake to investigate the matter.

(e) Upon the completion of any preliminary investigation deemed appropriate, the assigned member shall determine whether a matter suitable for arbitration has been presented. If the assigned member determines that a matter should not be arbitrated because it appears to be frivolous or moot or because jurisdiction is or becomes unwarranted, he or she shall prepare a brief written report setting forth the facts and a recommendation of dismissal for submission to the chairperson.

(f) If the chairperson concurs in the assigned member's recommendation, the matter shall be closed and the parties so advised. If the chairperson disapproves the assigned member's recommendation, he or she may proceed as hereinafter provided.

(g) If, following the preliminary investigation, the assigned member concludes that a matter suitable for arbitration has been stated, he or she shall notify the parties that the committee has assumed jurisdiction but will delay any further steps until the expiration of a 30-day period during which the parties shall be urged to exert their best efforts to reach an amicable resolution of their dispute.

(h) If the parties do not themselves settle the dispute within the 30-day period, the assigned member shall invite the parties to execute a consent to binding arbitration. If either party desires not to execute such consent, the matter shall be arbitrated with the understanding that the result will be nonbinding. At any time thereafter the parties may agree that the results will be binding.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.0805 Arbitration Proceedings**

(a) After ascertaining whether the arbitration will be binding or non-binding, the chairperson shall assign the matter to a hearing panel composed of one [lawyer] member of the committee if the amount in dispute is \$2,000 or less, or to a three-member panel, containing at least one lawyer and at least one layperson selected by the chairperson if the amount in dispute is more than \$2,000. The chairperson shall designate a lawyer member of a panel to serve as chairperson of the panel.

(b) It shall be the obligation of any member so designated to serve as arbitrator to disclose to the chairperson of the committee any reasons why he or she cannot ethically or conscientiously serve. In the event that a member so designated to serve declines or is unable to serve, the chairperson shall select another committee member who may be eligible. In the designation of panel members, the chairperson shall strive to rotate selection of panel members in an equitable manner.

(c) If at the time set for a hearing before a three-member panel, all three members are not present, the chairperson of the panel, or in the event of his or her unavailability, the chairperson of the committee, in his or her sole discretion shall decide either to postpone the hearing, or, with

the consent of the parties, to proceed with the hearing with one member of the panel as the sole arbitrator, in which case he or she shall also designate the member of the panel who will hear the case as sole arbitrator. In no event will a hearing be conducted by or proceed with two arbitrators.

(d) If any member of a three-member panel becomes unable to continue to act while the matter is pending and before a decision has been made, the proceedings to that point shall be declared null and void and the matter assigned to a new panel for rehearing unless the parties, with the consent of the panel chairperson, or in the event of his or her unavailability, the chairperson of the committee, consent to proceed with the hearing with one of the remaining members of the panel as the sole arbitrator.

(e) If the parties to a controversy agree, they may waive an oral hearing and submit their contentions in writing to the arbitrator(s) assigned who may then determine the controversy. However, the arbitrator(s) may require oral testimony from any party or witness after due notice to all parties.

(f) The members of the committee selected as arbitrator(s) of any dispute shall be vested with all the powers and shall assume all the duties granted and imposed upon neutral arbitrators by the Uniform Arbitrations Act as adopted in North Carolina (G.S. 1-561.1 et seq.) not in conflict with these rules.

(g) The single arbitrator or panel assigned shall hold a hearing within 30 days after the receipt of the assignment and shall render a decision within 30 days after the close of the hearing. The decision of the panel shall be made by a majority of the panel where heard by three members, or by the one member of the panel who was designated as sole arbitrator, as provided herein.

(h) The chairperson of the panel or the single arbitrator, as the case may be, shall fix a time and place for the hearing and shall cause written notice thereof to be sent to the other members of the panel and served personally or by registered or certified mail on the parties to the arbitration not less than seven days before the hearing. A party's appearance at a scheduled hearing shall constitute a waiver on his or her part of any deficiency with respect to the giving of notice of the hearing.

(i) The term "party" as used in these rules refers to a party to an arbitration and shall include the person(s) or entity requesting arbitration and any lawyer with whom that person(s) or entity is in disagreement regarding a legal fee.

(j) The parties to the arbitration are entitled to be heard, to present evidence and to cross-examine witnesses appearing at the hearing. Any party to an arbitration has the right to be represented by an attorney at any stage of the arbitration proceeding. The chairperson of the committee shall have the discretion to appoint an attorney member of the committee to represent the nonlawyer party on a pro bono basis. Any party may also have a hearing reported by a court reporter at his or her expense by written request presented to the chairperson of the committee and other parties to the arbitration at least three days prior to the date of the hearing. In the event of such request, any other party to the arbitration shall be entitled to acquire at his or her own expense a copy of the reporter's transcript of the testimony by arrangements made directly with the reporter. It shall be the duty and responsibility of the party requesting that a hearing be reported to make the necessary arrangements to have the court reporter present at the hearing.

(k) All parties and counsel shall have an absolute right to attend all hearings. The exclusion of other persons or witnesses waiting to be heard shall rest in the discretion of the arbitrator(s).

(l) Adjourned dates for the continuation of any hearing which cannot be completed on the first day shall be fixed for such times and places as the arbitrator(s) may select with due regard to the circumstances of all the parties and the desirability of a speedy determination. Upon request of a party for good cause, or upon its own determination, the arbitrator(s) may postpone the hearing from time to time.

(m) The sole arbitrator or the chairperson of a panel, as the case may be, shall preside at the hearing. The sole arbitrator or the chairperson of the panel shall rule on the admission and exclusion of evidence and on questions of procedure and shall exercise all powers relating to the conduct of the hearing. In conducting the hearing and in making rulings concerning evidence and procedure, the arbitrator(s) shall endeavor to afford all parties a fair and reasonably informal opportunity to be fully heard and shall disregard procedural and evidentiary rules or technicalities tending to frustrate that purpose.

(n) The arbitrator(s) may request opening statements and may prescribe the order of proof. In any event, all parties shall be afforded full opportunity for the presentation of any material evidence. In the interests of time and economy, the panel may examine witnesses and refuse to hear testimony which is deemed redundant or irrelevant.

(o) On request of any party to the arbitration or any arbitrator, the testimony of witnesses shall be given under oath. When so requested, the sole arbitrator or the chairperson of the panel shall administer oaths to witnesses testifying at the hearing.

(p) If either party, having agreed to binding arbitration and having been duly notified of a hearing, fails to appear, the arbitrator(s) may hear and determine the controversy upon the evidence produced, notwithstanding such failure to appear, and enter a binding decision. If a party, not having agreed to binding arbitration, but having been duly notified of a hearing, fails to appear, the arbitrator(s) may terminate the arbitration. For good cause shown, the arbitrator(s) may also excuse a party's failure to appear and reschedule a hearing. If the lawyer/party's failure to appear results in termination, the chairperson of the committee shall report that fact to the coordinator of fee arbitration and the counsel of the North Carolina State Bar who may treat the matter as a grievance against the lawyer. If the client/party's failure to appear results in termination, the chairperson of the committee shall likewise inform the coordinator of fee arbitration and advise the lawyer that he or she may proceed, if desired, with other means of collecting the legal fee in question.

(q) Before closing the hearing, the arbitrator(s) shall specifically inquire of all parties whether they have further evidence to submit in whatever form. If the answer is negative, the hearing shall be declared closed and a notation to that effect made by the arbitrator(s) as well as the date for submission of memoranda or briefs if requested by the arbitrator(s).

(r) In the sole discretion of the arbitrator(s) and for good cause shown, the hearing may be reopened at any time before the decision is signed and filed.

(s) In the event of the death or incompetency of a party to the arbitration proceeding, prior to the close of the hearing, the proceeding shall abate without prejudice to either party to proceed in a court of proper jurisdiction to seek such relief as may be warranted. In the event of death or incompetency of a party after the close of the hearing but prior to a decision, a decision shall nevertheless be rendered. If the parties have agreed to binding arbitration, the decision shall be binding upon the heirs, administrators, or executors of the deceased and on the estate or guardian of the incompetent.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### **.0806 The Decision**

(a) The purpose of arbitration under these rules is to resolve the underlying dispute by determining the proper charge for the legal services rendered. In making that determination the arbitrators may consider all factors they deem relevant, but should give special consideration to the intentions and understandings of the parties at the time the representation was undertaken, as well as the provisions of Rule 2.6 of the North Carolina Rules of Professional Conduct. Of particular significance should be any written fee agreement executed by the parties.

(b) The result of the arbitration shall be expressed in a written decision signed by a majority of the arbitrators. A dissent shall be signed sepa-

ately. A decision may also be entered on consent of all the parties. Once a decision is signed and filed, the hearing may not be reopened except upon consent of all parties.

(c) While it is not required that a decision be in any particular form, it should in general consist of a preliminary statement reciting the jurisdictional facts and the decision. It shall include a determination of all questions submitted to the arbitrator(s), the decision of which is necessary in order to determine the controversy.

(d) The original and four copies of the decision shall be signed by the sole arbitrator or, if the matter is heard by a three-member panel, by the members of the panel concurring therein.

(e) The sole arbitrator or the chairperson of the panel shall forward the decision, together with the entire file, to the chairperson of the committee who shall thereupon, for and on behalf of the arbitrator(s), serve a signed copy of the award on each party to the arbitration personally or by registered or certified mail. The chairperson shall also send a copy of the decision to the coordinator of fee arbitration.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### **.0807 Enforcement of the Decision**

In any case in which both parties signed a consent to binding arbitration, any award rendered may be enforced by any court of competent jurisdiction. In all other cases, the parties are strongly encouraged to abide by the decision.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### **.0808 Record Keeping**

The coordinator of fee arbitration shall keep a log of each request for arbitration filed, which log shall contain the following information:

- (1) the client's name;
- (2) date of the request;
- (3) the lawyer's name;
- (4) the district in which the lawyer resides;
- (5) how the dispute was resolved (heard by panel, no merit, fee adjusted, attorney/client agreement, etc.);
- (6) the time necessary to resolve the dispute.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **Section .0900 Procedures for the Membership and Fees Committee**

#### **.0901 Transfer to Inactive Status**

(a) Petition for Transfer to Inactive Status

Any member who desires to be transferred to inactive status shall file a duly verified petition with the secretary addressed to the council setting forth fully

- (1) the member's name and current address;
- (2) the date of the member's admission to the North Carolina State Bar;
- (3) the reasons why the member desires transfer to inactive status;
- (4) that the member is at the time of filing the petition a member in good standing having paid all fees required and without any grievances or disciplinary complaints undisposed of against him or her;
- (5) any other matters pertinent to the petition.

(b) Conditions Upon Transfer

No member may be voluntarily transferred to disability-inactive status or retired/nonpracticing inactive status until:

- (1) the member has paid all membership fees, late fees and other costs assessed against the member by the North Carolina State Bar, and
- (2) all grievances and disciplinary matters pending against the member have been finally resolved.

(c) Order Transferring Member to Inactive Status

Upon receipt of a petition which satisfies the provisions of Rule .0901(a) above, the council may, in its discretion, enter an order transferring the member to inactive status. The order shall become effective immediately upon entry by the council. A copy of the order shall be served on the member pursuant to Rule 4 of the N.C. Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized by Rule 4 of the N.C. Rules of Civil Procedure to serve process.

History Note: Statutory Authority G.S. 84-16; G.S. 84-23

Readopted Effective December 8, 1994

**.0902 Reinstatement from Inactive Status**

(a) Eligibility to Apply for Reinstatement

Any member who has been transferred to inactive status may petition the council for an order reinstating the member as an active member of the North Carolina State Bar.

(b) Contents of Reinstatement Petition

The petition shall set out facts showing the following:

(1) that the member has provided all information requested in an application form prescribed by the council and has signed the form under oath;

(2) that the member has the moral qualifications, competency and learning in the law required for admission to practice law in the state of North Carolina, and that the member's resumption of the practice of law within this state will be neither detrimental to the integrity and standing of the Bar or the administration of justice nor subversive of the public interest;

(3) that the member has paid a \$125.00 reinstatement fee, the membership fees for the current year in which the application is filed and all costs incurred by the North Carolina State Bar in investigating and processing the application. The reinstatement fee and costs shall be retained by the North Carolina State Bar but the membership fees shall be refunded if the petition is denied.

(c) Service of Reinstatement Petition

The petitioner shall contemporaneously serve a copy of the petition on the secretary and upon each member of the Membership and Fees Committee. The secretary shall transmit a copy of the petition to the counsel.

(d) Response by Counsel

The counsel will conduct any necessary investigation regarding the petition. The counsel may file a response to the petition with the secretary within 15 days after service of the petition. The response must set out specific objections sufficient to put the petitioner on notice of the facts or events at issue. The counsel will serve a copy of any response upon the petitioner and the members of the Membership & Fees Committee.

(e) Response by Membership and Fees Committee

Any member of the Membership and Fees Committee may file

(1) an objection to the petition with the secretary within 15 days after receipt of the petition. The response must set out specific objections sufficient to put the petitioner on notice of the facts or events at issue. The objecting member will serve a copy of any response filed upon the petitioner and upon the counsel. The objecting member shall not participate in any vote on the petition.

(2) a request for additional investigation of the petition within 15 days after the member receives the petition.

(f) Uncontested Petitions

If no timely objection to the petition is filed within the time set out herein by the counsel or a member of the Membership and Fees Committee, the Membership and Fees Committee will consider the petition at its next meeting and shall make a recommendation to the council regarding whether the petition should be granted.

(g) Contested Petitions for Reinstatement

(1) Hearing Procedure

If a timely objection to the petition is filed by the counsel or a member of the Membership and Fees Committee, the secretary will refer

the matter to the chairperson of the Membership and Fees Committee of the North Carolina State Bar for hearing. Within 14 days after the objection is filed, the chairperson will appoint three members of the Membership and Fees Committee to serve as a hearing panel. The chairperson may appoint him or herself as a member of a hearing panel. The chairperson will schedule a time and place for a hearing before the hearing panel and will notify the counsel and the petitioner of the time and place of the hearing. The hearing will be conducted in accordance with the North Carolina Rules of Civil Procedure for non-jury trials insofar as practicable and the Rules of Evidence applicable in superior court, unless the parties agree otherwise.

(2) Hearing Panel Recommendation

Following the hearing on a contested reinstatement petition, the hearing panel will make a written recommendation to the full Membership and Fees Committee regarding whether the petitioner's license should be reinstated. The recommendation shall include appropriate findings of fact and conclusions of law in support of its recommendation.

(3) Record to Membership and Fees Committee

(A) The petitioner will compile a record of the proceedings before the hearing panel to the Membership and Fees Committee, including a legible copy of the complete transcript, all exhibits introduced into evidence and all pleadings, motions and orders, unless the petitioner and counsel agree in writing to shorten the record. Any agreements regarding the record shall be included in the record transmitted to the Membership and Fees Committee.

(B) The petitioner shall provide a copy of the record to the counsel not later than 90 days after the hearing unless an extension is granted by the chairperson of the committee for good cause shown.

(C) The petitioner will transmit a copy of the record to each committee member who did not sit on the hearing panel no later than 30 days before the meeting at which the petition is to be considered.

(D) The petitioner shall bear all of the costs of transcribing, copying and transmitting the record to the Membership and Fees Committee.

(E) If the petitioner fails to comply fully with any of the provisions of Rule .0902(g)(3)(A)-(D) above, the counsel may file a motion to the secretary to dismiss the petition.

(4) Committee Recommendation

(A) In his or her discretion, the chairperson of the Committee may permit counsel for the State Bar and the petitioner to present oral or written argument, but the committee will not consider additional evidence not in the record transmitted from the hearing panel, absent a showing that the ends of justice so require or that undue hardship will result if the additional evidence is not presented.

(B) After considering the record and the arguments of counsel, if any, the Membership and Fees Committee will make a written recommendation regarding whether the petition should be granted. The chairperson of the committee shall sign the recommendation for the committee members.

(5) Record to Council

(A) Following entry of the written recommendation of the Membership and Fees Committee, the petitioner will transmit a copy of the record of the proceedings before the hearing panel and the Membership and Fees Committee to each council member no later than 30 days before the council meeting at which the petition is to be considered.

(B) The petitioner shall bear all of the costs of transcribing, copying and transmitting the record to the council.

(6) Order by Council

The council will review the record and the recommendations of the hearing panel and the Membership and Fees Committee and will determine whether and upon what conditions the petitioner will be reinstated. The council may tax the costs attributable to the proceeding against the petitioner.

History Note: Statutory Authority G.S. 84-16; G.S. 84-23

Readopted Effective December 8, 1994

### **.0903 Failure to Pay Membership Fees**

#### **(a) Notice of Overdue Fees**

Whenever it appears that a member has failed to comply with the rules regarding payment of the annual membership fee, the secretary shall prepare a written notice

(1) directing the member to show cause within 60 days of the date of the notice why he or she should not be suspended from the practice of law, and

(2) demanding payment of a \$75 late fee.

#### **(b) Service of the Notice**

The notice shall be served on the member pursuant to Rule 4 of the North Carolina Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process.

#### **(c) Entry of Order of Suspension for Nonpayment of Dues**

Whenever it appears that a member has failed to comply with the rules regarding payment of the annual membership fee and any late fees imposed pursuant to Rule .0903(a) above, and that more than 60 days have passed from service of the notice to show cause, the council may enter an order suspending the member from the practice of law. The order shall be effective when entered by the council. A copy of the order shall be served on the member pursuant to Rule 4 of the North Carolina Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process.

#### **(d) Late Tender of Membership Fees**

If a member tenders the annual membership fee and the \$75 late fee to the North Carolina State Bar after July 1 of a given year, but before a suspension order is entered by the council, no order of suspension will be entered.

History Note: Statutory Authority G.S. 84-23; G.S. 84-34

Readopted Effective December 8, 1994

### **.0904 Reinstatement After Suspension for Failure to Pay Fees.**

#### **(a) Reinstatement Within 30 Days of Entry of Suspension Order**

A member who has been suspended for nonpayment of annual membership fees and/or late fees may petition the secretary for an order of reinstatement of the member's license at any time up to 30 days after entry of the suspension order. The secretary shall enter an order reinstating the member to active status upon receipt of a timely petition and satisfactory showing by the member of payment of all membership fees, late fees and costs.

#### **(b) Reinstatement More than 30 Days After Entry of Suspension Order**

At any time more than 30 days after entry of an order of suspension, a member who has been suspended for nonpayment of dues and/or late fees may petition the council for an order of reinstatement. The petition will be filed with the secretary, who will transmit a copy to the counsel.

#### **(c) Contents of Reinstatement Petition**

The petition shall set out facts showing the following:

(1) that the member has provided all information requested in a form to be prescribed by the council and has signed the form under oath.

(2) that the member has the moral qualifications, competency and learning in the law required for admission to practice law in the state of North Carolina, and that the member's resumption of the practice of law will be neither detrimental to the integrity and standing of the

Bar or the administration of justice nor subversive of the public interest.

(3) that the member has paid a \$125 reinstatement fee, a \$75 late fee, all past and current membership fees, plus all costs incurred by the North Carolina State Bar in investigating and processing the application for reinstatement.

#### **(d) Procedure**

The petition for reinstatement shall be handled as provided for in Rule .0902(c)-(g) of this subchapter, governing petitions for reinstatement from inactive status.

History Note: Statutory Authority G.S. 84-16; G.S. 84-23; G.S. 84-34

Readopted Effective December 8, 1994

## **Section .1000 Rules Governing Continuing Legal Education Hearings Before the Membership and Fees Committee**

### **.1001 Purpose of these Regulations**

The Rules Governing the Administration of the Continuing Legal Education Program direct the Board of Continuing Legal Education to refer two types of matters for determination by the State Bar Council after a hearing before the Membership and Fees Committee. The first type of matter is that in which the question is whether to suspend a member's license for the member's failing to comply with the requirements of the rules. When the board notifies a member of an apparent failure to meet the requirements, and the member responds, the board may determine that the member has failed to comply and that good cause for the failure has not been shown. The rules provide that, when the board reaches those conclusions, it "shall refer the matter to the council for determination after hearing by the Membership and Fees Committee." Rule .1523 of this subchapter.

The second type of matter referred by the board is that involving the question of whether to reinstate a member who has been suspended for noncompliance. When the board, in considering a petition for reinstatement, determines that the deficiency has not been cured or that the reinstatement fee has not been paid, the rules provide that the board "shall refer the matter to the Membership and Fees Committee for hearing." Rule .1524 of this subchapter.

The purpose of these rules is to prescribe the standards and processes by which the Membership and Fees Committee shall conduct the hearings and make the determinations contemplated by the Rules Governing the Administration of the Continuing Legal Education Program.

History Note: Statutory Authority G.S. 84-23; Order of the North Carolina Supreme Court, dated October 7, 1987, 318 N.C. 711. Readopted Effective December 8, 1994

### **.1002 Definitions**

(1) "Committee," unless otherwise indicated, shall mean the Membership and Fees Committee of the North Carolina State Bar.

(2) Other words and phrases shall have the meanings set forth in Rule .1501(b) of this subchapter.

History Note: Statutory Authority G.S. 84-23; Order of the North Carolina Supreme Court, dated October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

### **.1003 Referral from the Board**

When the board refers a matter to the council for determination after a hearing by the committee, the board shall transmit to the committee

(1) a notice of referral from the board to the committee, clearly identifying the member whose license is in question and the nature of the matter being referred;

(2) copies of all relevant written materials accumulated or created by the board;

(3) copies of all written materials submitted to the board by the member whose license is in question;

(4) a written statement of the board's findings and determinations in the matter that is being referred.

History Note: Statutory Authority G.S. 84-23; Order of the North Carolina Supreme Court, dated October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

#### **.1004 Time of Hearing**

A matter referred to the committee for hearing shall be heard not less than 30 days and not more than 90 days after the date the notice of referral is received from the board by the committee.

History Note: Statutory Authority G.S. 84-23; Order of the North Carolina Supreme Court, dated October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

#### **.1005 Notice of Hearing**

(a) Time of Notice to Member - A member with respect to whom a matter has been referred for hearing shall receive notice of the hearing at least 20 days prior to the hearing.

(b) Service of Notice on Member - The notice of hearing shall be served on the member by registered mail.

(c) Content of Notice to Member - The notice of the hearing shall include

(1) notice of the date, time, and place of the hearing;

(2) notice to the member that he or she may submit for consideration written materials, including a written statement of explanation, at any time prior to or during the hearing;

(3) notice to the member that he or she may personally appear and be heard during the hearing;

(4) notice to the member that he or she may be represented by counsel at the hearing.

(d) Notice to the Board - Notice shall be transmitted to the board at least 20 days prior to the hearing of the date, time, and place of the hearing.

History Note: Statutory Authority G.S. 84-23; Order of the North Carolina Supreme Court, dated October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

#### **.1006 The Hearing**

(a) Nature of Inquiry: Suspension - When the matter being heard involves the question of whether a member's license shall be suspended for noncompliance, the purpose of the hearing shall be to determine, as a matter of fact,

(1) whether the member was in compliance with the requirements of the rules at the time the board made its determination;

(2) if the member was not in compliance, whether there is good cause why his or her license should not be suspended.

(b) Nature of Inquiry: Reinstatement - When the matter being heard involves the question of whether the license of a suspended member shall be reinstated, the purpose of the hearing shall be to determine, as a matter of fact,

(1) whether the continuing legal education deficiency which gave rise to the member's suspension had been cured at the time the board made its determination that it had not been cured;

(2) if the deficiency had been cured at the time the board made its determination, whether the suspended member had paid the required reinstatement fee at the time the board made its determination.

(c) The Forum - A matter before the committee for a hearing shall be heard by a panel of three members of the committee, one of whom shall serve as the presiding member, designated as provided in Rule .1007 of this subchapter.

(d) Member's Right to be Heard - A member whose license is the subject of a hearing shall have the right to

(1) to appear personally at the hearing;

(2) to speak and be heard at the hearing on any aspect of the matter being heard;

(3) submit for consideration relevant written materials, including a written statement of explanation, at any time prior to or during the hearing;

(4) be represented by counsel at the hearing.

(e) Information from the Board

(1) The panel shall consider the written materials described in Rule .1003 of this subchapter transmitted by the board to the committee.

(2) A member of the board, or other person authorized by the board, may attend the hearing and may present oral or written information and argument on any aspect of the matter being heard.

(f) Effect of Board's Findings on Issues of Accreditation and Approval - When the board has determined that a member has failed to comply with the requirements of the rules or that a suspended member has failed to cure a deficiency, upon its finding that credits essential to compliance or reinstatement were acquired in a course or program that was not properly accredited or approved,

(1) the board's finding that the course or program was not properly accredited or approved shall be presumed by the panel to be correct; and

(2) the member may rebut the presumption of correctness by satisfying the panel that the course or program had in fact been properly accredited or approved; or

(3) the member may rebut the presumption of correctness by satisfying the panel that the board acted contrary to its rules in failing to accredit or approve the course or program.

(g) Deliberations of the Panel - The panel shall conduct its deliberations, make its determinations, and adopt its recommendations in private.

(h) Decision of the Panel - The panel shall consider a matter in accord with the process described in Rules .1008 and .1009 of this subchapter and shall put its determinations and recommendations in writing.

History Note: Statutory Authority G.S. 84-23; Order of the North Carolina Supreme Court, dated October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

#### **.1007 The Panel**

(a) Assignment of Matter to Panel - A matter referred by the board for hearing and determination shall be assigned to a panel for hearing.

(b) Members of the Panel - A hearing panel shall consist of three members of the committee.

(c) Designation of Members - The members of a hearing panel shall be designated by the chairperson of the committee.

(d) Designation of Presiding Member - The chairperson of the committee shall designate one of the three members of a panel to serve as the presiding member.

(e) Duties of Presiding Member - The presiding member shall

(1) timely schedule the hearing;

(2) assure that proper and timely notice of hearing is given to the member and the board;

(3) preside at the hearing and rule on any question of procedure that may arise;

(4) preside at the deliberations of the panel;

(5) sign the written determinations and recommendations of the panel;

(6) report the panel's determinations and recommendations to the committee.

History Note: Statutory Authority G.S. 84-23; Order of the North Carolina Supreme Court, dated October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

#### **.1008 Suspension Hearing: Process for Determining a Matter Involving the Question of Suspension**

When the matter before the panel is one involving the question of whether a member shall be suspended for failing to comply with the requirements of the rules, the panel shall proceed as follows:

(a) Examination for Basis for Noncompliance Determination - The panel first shall examine the written information transmitted by the board to the committee, and shall determine whether that information provides a basis for the board's determination that the member had failed to comply with the requirements of the rules at the time the board made its determination.

(b) When There Is No Basis for Noncompliance Determination - If the written information from the board provides no basis for a determination of noncompliance, the panel shall determine that the member is in compliance and shall report to the committee a recommendation that the member not be suspended.

(c) When There Is Some Basis for Noncompliance Determination - If the written information from the board provides some basis for a determination of noncompliance, the panel then shall consider all information submitted to the panel or to the board by the member bearing on the issue of whether the member was in compliance with the requirements of the rules at the time the board made its determination.

(d) Assessing the Information on the Issue of Compliance

(1) Based on all the information before it, the panel shall determine whether it is persuaded that the member was not in compliance with the requirements of the rules at the time the board made its determination.

(2) In assessing the information on compliance, when the board's determination of noncompliance is based upon its finding that credits essential to compliance were acquired in a course or program that was not properly accredited or approved, the panel shall give that finding and any rebuttal information from the member the consideration described in Rule .1006(f) of this subchapter.

(e) When the Panel Makes a Determination of Compliance - If the panel is not persuaded that the member was not in compliance with the requirements of the rules at the time the board made its determination it shall determine that the member is in compliance and shall report to the committee a recommendation that the member not be suspended.

(f) When the Panel Makes a Determination of Noncompliance - If the panel is persuaded that the member was not in compliance with the requirements of the rules at the time the board made its determination, the panel then shall consider all information submitted to the panel or to the board by the member and submitted by the board to the panel bearing on the issue of whether there is good cause why the member's license should not be suspended.

(g) When the Panel Determines That There Is Good Cause - If the panel is satisfied that there is good cause that the member's license should not be suspended, it shall determine that there is good cause and shall report to the committee a recommendation that the member's license not be suspended.

(h) When the Panel Determines That There Is Not Good Cause - If the panel is not satisfied that there is good cause why the member's license should not be suspended, it shall determine that there is not good cause and shall report to the committee a recommendation that the member's license be suspended.

History Note: Statutory Authority G.S. 84-23; Order of the North Carolina Supreme Court, dated October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

### **.1009 Reinstatement Hearing: Process for Determining a Matter Involving the Question of Reinstatement**

When the matter before the panel is one involving the question of whether a suspended member shall be reinstated following a suspension for noncompliance with the rules, the panel shall proceed as follows:

(a) Examination of the Basis for Determination That Deficiency Not Cured - The panel first shall examine the written information transmitted by the board to the committee and shall determine whether that information provides a basis for the board's determination that the deficiency for

which the member's license was suspended had not been cured at the time the board made its determination.

(b) When There Is No Basis for Determination That Deficiency Not Cured - If the written information from the board provides no basis for a determination that the suspended member's deficiency had not been cured at the time the board made its determination, the panel shall determine that the deficiency had been cured and shall report to the committee a recommendation that the suspended member be reinstated.

(c) When There Is Some Basis for Determination That Deficiency Not Cured - If the written information from the board provides some basis for a determination that the suspended member's deficiency had not been cured at the time the board made its determination, the panel shall consider all information submitted to the panel or to the board by the member bearing on the issue of whether the deficiency had been cured at the time the board made its determination.

(d) Assessing the Information on the Issue of Cure

(1) Based upon all the information before it, the panel shall determine whether it is persuaded that the suspended member's deficiency had not been cured at the time the board made its determination.

(2) In assessing the information on cure, when the board's determination that the deficiency had not been cured is based upon its finding that credits essential to cure were acquired in a course or program that was not properly accredited or approved, the panel shall give that finding and any rebuttal information from the member the consideration described in Rule .1006(f) of this subchapter.

(e) When the Panel Determines That the Deficiency Had Not Been Cured - If the panel is persuaded that the suspended member's deficiency had not been cured at the time the board made its determination, it shall determine that the deficiency had not been cured and shall report to the committee a recommendation that the suspended member not be reinstated.

(f) When the Panel Determines That the Deficiency Had Been Cured - If the panel is persuaded that the suspended member's deficiency had been cured at the time the board made its determination, it shall determine that the deficiency had been cured and then shall consider all information submitted to the panel or to the board by the member and all information submitted by the board to the panel bearing on the issue of whether the reinstatement fee had been paid at the time the board made its determination.

(g) When the Panel Determines That Reinstatement Fee Had Been Paid - If the panel is not persuaded that the reinstatement fee had not been paid at the time the board made its determination, the panel shall determine that the fee had been paid and shall report to the committee a recommendation that the member be reinstated.

(h) When the Panel Determines That Reinstatement Fee Had Not Been Paid - If the panel has determined that the reinstatement fee had not been paid at the time the board made its determination, the panel shall determine that the fee had not been paid and shall report to the committee a recommendation that the member not be reinstated.

(i) When the Member Submits Information Indicating Remedial Intervening Events - When a suspended member submits information indicating that, after the board's determination and prior to the hearing before the panel, the suspended member cured the deficiency (if failure to cure was a basis for the denial), the panel shall remand the matter to the board with a request that it reconsider the matter in light of the new information.

History Note: Statutory Authority G.S. 84-23; Order of the North Carolina Supreme Court, dated October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

### **.1010 Report by the Panel to the Committee**

(a) Report by the Panel - At the first meeting of the committee following a panel's hearing a matter, the panel shall report to the committee its determinations and recommendations.

(b) When Report Recommends Reinstatement or No Suspension - If the panel reports to the committee, in a matter involving the question of suspension, a recommendation that the member not be suspended, or, in a matter involving the question of reinstatement, a recommendation that the member be reinstated, the committee shall accept the report, and the panel's recommendation shall be the recommendation of the committee.

(c) When Report Recommends Suspension or No Reinstatement - If the panel reports to the committee, in a matter involving the question of suspension, a recommendation that the member be suspended, or, in a matter involving the question of reinstatement, a recommendation that the member not be reinstated, the committee shall consider the information reported by the panel and shall determine whether there is any basis for the panel's recommendation.

(d) When Information Contains No Basis for Panel's Recommendation - If the information reported by the panel contains no basis for the panel's recommendation of suspension or its recommendation of no reinstatement, the committee shall reject the panel's recommendation and shall recommend, in a suspension matter, that the member not be suspended or, in a reinstatement matter, that the member be reinstated.

(e) When Information Contains Some Basis for Panel's Recommendation - If the information reported by the panel contains some basis for the panel's recommendation of suspension, or its recommendation of no reinstatement, the committee shall accept the panel's recommendation and shall recommend, in a suspension matter, that the member be suspended or, in a reinstatement matter, that the member not be reinstated.

History Note: Statutory Authority G.S. 84-23; Order of the North Carolina Supreme Court, dated October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

#### **.1011 Report by the Committee to the Council**

At the first meeting of the council following the committee's receiving the report of a panel on a matter, the committee shall report to the council for final action the committee's recommendation in the matter.

History Note: Statutory Authority G.S. 84-23; Order of the North Carolina Supreme Court, dated October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

### **Section .1100 Reserved**

### **Section .1200 Reserved**

## **Section .1300 Rules Governing the Administration of the Plan for Interest on Lawyers' Trust Accounts (IOLTA)**

#### **.1301 Purpose**

The IOLTA Board of Trustees (board) shall carry out the provisions of the Plan for Disposition of Funds Received by the North Carolina State Bar from Interest on Trust Accounts. The plan is: Any funds remitted to the North Carolina State Bar from depository institutions by reason of interest earned on trust accounts established by lawyers pursuant to Rule 10.3 of the Rules of Professional Conduct shall be deposited by the North Carolina State Bar through the board in a special account or accounts which shall be segregated from other funds of whatever nature received by the State Bar.

The funds received, and any interest, dividends, or other proceeds received thereafter with respect to these funds shall be used for programs concerned with the improvement of the administration of justice, under the supervision and direction of the board established under this plan to administer the funds. The board will award grants under the six categories approved by the North Carolina Supreme Court being mindful of its tax exempt status and the IRS rulings that private interests of the legal profession are not to be funded with IOLTA funds.

The programs for which the funds may be utilized shall consist of

(1) providing civil legal services for indigents;

(2) establishment and maintenance of lawyer referral system in order to assure that persons in need of legal services can obtain such services from a qualified attorney;

(3) enhancement and improvement of grievance and disciplinary procedures to protect the public more fully from incompetent or unethical attorneys;

(4) development of a client security fund to protect the public from loss due to dishonest or fraudulent practices on the part of lawyers;

(5) development and maintenance of a fund for student loans to enable meritorious persons to obtain a legal education when otherwise they would not have adequate funds for this purpose;

(6) such other programs designed to improve the administration of justice as may from time to time be proposed by the board and approved by the Supreme Court of North Carolina.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### **.1302 Jurisdiction: Authority**

The Board of Trustees of the North Carolina State Bar Plan for Interest on Lawyers' Trust Accounts (IOLTA) is created as a standing committee by the North Carolina State Bar Council pursuant to Chapter 84 of the North Carolina General Statutes for the disposition of funds received by the North Carolina State Bar from interest on trust accounts.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### **.1303 Operational Responsibility**

The responsibility for operating the program of the board rests with the governing body of the board, subject to the statutes governing the practice of law, the authority of the council and the rules of governance of the board.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### **.1304 Size of Board**

The board shall have nine members, at least six of whom must be attorneys in good standing and authorized to practice law in the state of North Carolina.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### **.1305 Lay Participation**

The board may have no more than three members who are not licensed attorneys.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### **.1306 Appointment of Members; When; Removal**

The members of the board shall be appointed by the Council of the North Carolina State Bar. The July quarterly meeting is when the appointments are made. Vacancies occurring by reason of death, resignation or removal shall be filled by appointment of the council at the next quarterly meeting following the event giving rise to the vacancy, and the person so appointed shall serve for the balance of the vacated term. Any member of the board may be removed at any time by an affirmative vote of a majority of the members of the council in session at a regularly called meeting.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### **.1307 Term of Office**

Each member who is appointed to the board shall serve for a term of three years beginning on September 1.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.1308 Staggered Terms**

It is intended that members of the board shall be elected to staggered terms such that three members are appointed in each year.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.1309 Succession**

Each member of the board shall be entitled to serve for two full three-year terms. No member shall serve more than two consecutive three-year terms, in addition to service prior to the beginning of a full three-year term, without having been off the board for at least three years.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.1310 Appointment of Chairperson**

The chairperson of the board shall be appointed from time to time as necessary by the council. The term of such individual as chairperson shall be for one year. The chairperson may be reappointed thereafter during his or her tenure on the board. The chairperson shall preside at all meetings of the board, shall prepare and present to the council the annual report of the board, and generally shall represent the board in its dealings with the public.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.1311 Appointment of Vice-Chairperson**

The vice-chairperson of the board shall be appointed from time to time as necessary by the council. The term of such individual as vice-chairperson shall be one year. The vice-chairperson may be reappointed thereafter during tenure on the board. The vice-chairperson shall preside at and represent the board in the absence of the chairperson and shall perform such other duties as may be assigned to him or her by the chairperson or by the board.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.1312 Source of Funds**

Funding for the program carried out by the board shall come from funds remitted from depository institutions by reason of interest earned on trust accounts established by lawyers pursuant to Rule 10.3 of the Rules of Professional Conduct, voluntary contributions from lawyers, and interest, dividends or other proceeds earned on the board's funds from investments.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.1313 Fiscal Responsibility**

All funds of the board shall be considered funds of the North Carolina State Bar, with the beneficial interest in those funds being vested in the board for grants to qualified applicants in the public interest, less administrative costs. These funds shall be administered and disbursed by the board in accordance with rules or policies developed by the North Carolina State Bar and approved by the North Carolina Supreme Court. The funds shall be used to pay the administrative costs of the IOLTA program and to fund grants approved by the board under the six categories approved by the North Carolina Supreme Court as outlined above.

(a) Maintenance of Accounts: Audit - The funds of the IOLTA program shall be maintained in a separate account from funds of the North Carolina State Bar such that the funds and expenditures therefrom can be readily identified. The accounts of the board shall be audited on an annual basis. The audit will be conducted after the books are closed at a time determined by the auditors, but not later than March 31 of the year following the year for which the audit is to be conducted.

(b) Investment Criteria - The funds of the board shall be handled, invested and reinvested in accordance with investment policies adopted by the Council of the North Carolina State Bar for handling of dues, rents,

and other revenues received by the North Carolina State Bar in carrying out its official duties.

(c) Disbursements - Disbursement of funds of the board in the nature of grants to qualified applicants in the public interest, less administrative costs, shall be made by the board in accordance with policies developed by the North Carolina State Bar and approved by the North Carolina Supreme Court. The board shall adopt an annual operational budget and disbursements shall be made in accordance with the budget as adopted. The board shall determine the signatories on the IOLTA accounts.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.1314 Meetings**

The board by resolution may set regular meeting dates and places. Special meetings of the board may be called at any time upon notice given by the chairperson, the vice-chairperson or any two members of the board. Notice of meeting shall be given at least two days prior to the meeting by mail, telegram, facsimile transmission, or telephone. A quorum of the board for conducting its official business shall be a majority of the total membership of the board.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.1315 Annual Report**

The board shall prepare at least annually a report of its activities and shall present same to the council one month prior to its annual meeting.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.1316 Severability**

If any provision of this plan or the application thereof is held invalid, the invalidity does not affect other provisions or application of the plan which can be given effect without the invalid provision or application, and to this end the provisions of the plan are severable.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

## **Section .1400 Rules Governing the Administration of the Client Security Fund of the North Carolina State Bar**

### **.1401 Purpose; Definitions**

(a) The Client Security Fund of the North Carolina State Bar was established by the Supreme Court of North Carolina pursuant to an order dated August 29, 1984. The fund is a standing committee of the North Carolina State Bar Council pursuant to an order of the Supreme Court dated October 10, 1984, as amended. Its purpose is to reimburse, in whole or in part in appropriate cases and subject to the provisions and limitations of the Supreme Court's orders and these rules, clients who have suffered financial loss as the result of dishonest conduct of lawyers engaged in the private practice of law in North Carolina, which conduct occurred on or after January 1, 1985.

(b) As used herein the following terms have the meaning indicated.

(1) "Applicant" shall mean a person who has suffered a reimbursable loss because of the dishonest conduct of an attorney and has filed an application for reimbursement.

(2) "Attorney" shall mean an attorney who, at the time of alleged dishonest conduct, was licensed to practice law by the North Carolina State Bar. The fact that the alleged dishonest conduct took place outside the state of North Carolina does not necessarily mean that the attorney was not engaged in the practice of law in North Carolina.

(3) "Board" shall mean the Board of Trustees of the Client Security Fund.

(4) "Council" shall mean the North Carolina State Bar Council.

(5) "Dishonest conduct" shall mean wrongful acts committed by an attorney against an applicant in the nature of embezzlement from the applicant or the wrongful taking or conversion of monies or other property of the applicant, which monies or other property were entrusted to the attorney by the applicant by reason of an attorney-client relationship between the attorney and the applicant or by reason of a fiduciary relationship between the attorney and the applicant customary to the practice of law.

(6) "Fund" shall mean the Client Security Fund of the North Carolina State Bar.

(7) "Reimbursable losses" shall mean only those losses of money or other property which meet all of the following tests:

(A) the dishonest conduct which occasioned the loss occurred on or after January 1, 1985;

(B) the loss was caused by the dishonest conduct of an attorney acting either as an attorney for the applicant or in a fiduciary capacity for the benefit of the applicant customary to the private practice of law in the matter in which the loss arose;

(C) the applicant has exhausted all viable means to collect applicant's losses and has complied with these rules.

(8) The following shall not be deemed "reimbursable losses":

(A) losses of spouses, parents, grandparents, children and siblings (including foster and half relationships), partners, associates or employees of the attorney(s) causing the losses;

(B) losses covered by any bond, security agreement or insurance contract, to the extent covered thereby;

(C) losses incurred by any business entity with which the attorney or any person described in Rule .1401(b)(8)(A) above is an officer, director, shareholder, partner, joint venturer, promoter or employee;

(D) losses, reimbursement for which has been otherwise received from or paid by or on behalf of the attorney who committed the dishonest conduct;

(E) losses arising in investment transactions in which there was neither a contemporaneous attorney-client relationship between the attorney and the applicant nor a contemporaneous fiduciary relationship between the attorney and the applicant customary to the practice of law. By way of illustration but not limitation, for purposes of this rule (Rule .1401 (b)(8)(E)), an attorney authorized or permitted by a person or entity other than the applicant as escrow or similar agent to hold funds deposited by the applicant for investment purposes shall not be deemed to have a fiduciary relationship with the applicant customary to the practice of law.

(9) "State Bar" shall mean the North Carolina State Bar.

(10) "Supreme Court" shall mean the North Carolina Supreme Court.

(11) "Supreme Court orders" shall mean the orders of the Supreme Court dated August 29, 1984, and October 10, 1984, as amended, authorizing the establishment of the Client Security Fund of the North Carolina State Bar and approving the rules of procedure of the Fund.

History Note: Authority - Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984

Readopted Effective December 8, 1994

#### **.1402 Jurisdiction: Authority**

(a) Chapter 84 of the General Statutes vests in the State Bar authority to control the discipline, disbarment, and restoration of licenses of attorneys; to formulate and adopt rules of professional ethics and conduct; and to do all such things necessary in the furtherance of the purposes of the statutes governing the practice of the law as are not themselves prohibited by law. G.S. 84-22 authorizes the State Bar to establish such committees, standing or special, as from time to time the council deems appropriate for the proper discharge of its duties; and to determine the

number of members, composition, method of appointment or election, functions, powers and duties, structure, authority to act, and other matters relating to such committees. The rules of the State Bar, as adopted and amended from time to time, are subject to approval by the Supreme Court under G.S. 84-21.

(b) The Supreme Court orders, entered in the exercise of the Supreme Court's inherent power to supervise and regulate attorney conduct, authorized the establishment of the Fund, as a standing committee of the council, to be administered by the State Bar under rules and regulations approved by the Supreme Court.

History Note: Authority - Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984

Readopted Effective December 8, 1994

#### **.1403 Operational Responsibility**

The responsibility for operating the Fund and the program of the board rests with the board, subject to the Supreme Court orders, the statutes governing the practice of law, the authority of the council, and the rules of the board.

History Note: Authority - Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984

Readopted Effective December 8, 1994

#### **.1404 Size of Board**

The board shall have five members, four of whom must be attorneys in good standing and authorized to practice law in the state of North Carolina.

History Note: Authority - Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984

Readopted Effective December 8, 1994

#### **.1405 Lay Participation**

The board shall have one member who is not a licensed attorney.

History Note: Authority - Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984

Readopted Effective December 8, 1994

#### **.1406 Appointment of Members; When; Removal**

The members of the board shall be appointed by the council. Any member of the board may be removed at any time by the affirmative vote of a majority of the members of the council at a regularly called meeting. Vacancies occurring by reason of death, disability, resignation, or removal of a member shall be filled by appointment of the president of the State Bar with the approval of the council at its next quarterly meeting following the event giving rise to the vacancy, and the person so appointed shall serve for the balance of the vacated term.

History Note: Authority - Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984

Readopted Effective December 8, 1994

#### **.1407 Term of Office**

Each member who is appointed to the board, other than a member appointed to fill a vacancy created by the death, disability, removal or resignation of a member, shall serve for a term of five years beginning as of the first day of the month following the date upon which the appointment is made by the council. A member appointed to fill a vacancy shall serve the remainder of the vacated term.

History Note: Authority - Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984

Readopted Effective December 8, 1994

#### **.1408 Staggered Terms**

It is intended that members of the board shall be elected to staggered terms such that one member is appointed in each year.

History Note: Authority - Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984

Readopted Effective December 8, 1994

#### **.1409 Succession**

Each member of the board shall be entitled to serve for one full five-year term. A member appointed to fill a vacated term may be appointed to serve one full five-year term immediately following the expiration of the vacated term but shall not be entitled as of right to such appointment. No person shall be reappointed to the board until the expiration of three years following the last day of the previous term of such person on the board.

History Note: Authority - Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984

Readopted Effective December 8, 1994

#### **.1410 Appointment of Chairperson**

The chairperson of the board shall be appointed from the members of the board annually by the council. The term of the chairperson shall be one year. The chairperson may be reappointed by the council thereafter during tenure on the board. The chairperson shall preside at all meetings of the board, shall prepare and present to the council the annual report of the board, and generally shall represent the board in its dealings with the public.

History Note: Authority - Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984

Readopted Effective December 8, 1994

#### **.1411 Appointment of Vice-Chairperson**

The vice-chairperson of the board shall be appointed from the members of the board annually by the council. The term of the vice-chairperson shall be one year. The vice-chairperson may be reappointed by the council thereafter during tenure on the board. The vice-chairperson shall preside at and represent the board in the absence of the chairperson and shall perform such other duties as may be assigned to him by the chairperson or by the board.

History Note: Authority - Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984

Readopted Effective December 8, 1994

#### **.1412 Source of Funds**

Funds for the program carried out by the board shall come from assessments of members of the State Bar as ordered by the Supreme Court, from voluntary contributions, and as may otherwise be received by the Fund.

History Note: Authority - Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984

Readopted Effective December 8, 1994

#### **.1413 Fiscal Responsibility**

All funds of the board shall be considered funds of the State Bar and shall be maintained, invested, and disbursed as follows:

(a) Maintenance of Accounts; Audit - The State Bar shall maintain a separate account for funds of the board such that such funds and expenditures therefrom can be readily identified. The accounts of the board shall be audited annually in connection with the audits of the State Bar.

(b) Investment Criteria - The funds of the board shall be kept, invested, and reinvested in accordance with investment policies adopted by the council for dues, rents, and other revenues received by the State Bar in carrying out its official duties. In no case shall the funds be invested or reinvested in investments other than such as are permitted to fiduciaries under the General Statutes of North Carolina.

(c) Disbursement - Disbursement of funds of the board shall be made by or under the direction of the secretary of the State Bar.

History Note: Authority - Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984

Readopted Effective December 8, 1994

#### **.1414 Meetings**

The annual meeting of the board shall be held in October of each year in connection with the annual meeting of the State Bar. The board by resolution may set other regular meeting dates and places. Special meetings of the board may be called at any time upon notice given by the chairperson, the vice-chairperson, or any two members of the board. Notice of meeting shall be given at least two days prior to the meeting by mail, telegram, facsimile transmission or telephone. A quorum of the board for conducting its official business shall be a majority of the members serving at a particular time. Written minutes of all meetings shall be prepared and maintained.

History Note: Authority - Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984

Readopted Effective December 8, 1994

#### **.1415 Annual Report**

The board shall prepare at least annually a report of its activities and shall present the same to the council at the annual meeting of the State Bar.

History Note: Authority - Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984

Readopted Effective December 8, 1994

#### **.1416 Appropriate Uses of the Client Security Fund**

(a) The board may use or employ the Fund for any of the following purposes within the scope of the board's objectives as heretofore outlined:

(1) to make reimbursements on approved applications as herein provided;

(2) to purchase insurance to cover such losses in whole or in part as is deemed appropriate;

(3) to invest such portions of the Fund as may not be needed currently to reimburse losses, in such investments as are permitted to fiduciaries by the General Statutes of North Carolina;

(4) to pay the administrative expenses of the board, including employment of counsel to prosecute subrogation claims.

(b) The board with the authorization of the council shall, in the name of the North Carolina State Bar, enforce any claims which the board may have for restitution, subrogation, or otherwise, and may employ and compensate consultants, agents, legal counsel, and such other employees as it deems necessary and appropriate.

History Note: Authority - Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984

Readopted Effective December 8, 1994

#### **.1417 Applications for Reimbursement**

(a) The board shall prepare a form of application for reimbursement which shall require the following minimum information, and such other information as the board may from time to time specify:

(1) the name and address of the applicant;

(2) the name and address of the attorney who is alleged to have engaged in dishonest conduct;

(3) the amount of the alleged loss for which application is made;

(4) the date on or period of time during which the alleged loss occurred;

(5) a general statement of facts relative to the application;

(6) a description of any relationship between the applicant and the attorney of the kinds described in Rules .1401(b)(8)(A) and(C) of this subchapter;

(7) verification by the applicant;

(8) all supporting documents, including

(A) copies of any court proceedings against the attorney;

(B) copies of all documents showing any reimbursement or receipt of funds in payment of any portion of the loss.

(b) The application shall contain the following statement in boldface type:

"IN ESTABLISHING THE CLIENT SECURITY FUND PURSUANT TO ORDER OF THE SUPREME COURT OF NORTH CAROLINA, THE NORTH CAROLINA STATE BAR DID NOT CREATE OR ACKNOWLEDGE ANY LEGAL RESPONSIBILITY FOR THE ACTS OF INDIVIDUAL ATTORNEYS IN THE PRACTICE OF LAW. ALL REIMBURSEMENTS OF LOSSES FROM THE CLIENT SECURITY FUND SHALL BE A MATTER OF GRACE IN THE SOLE DISCRETION OF THE BOARD ADMINISTERING THE FUND AND NOT A MATTER OF RIGHT. NO APPLICANT OR MEMBER OF THE PUBLIC SHALL HAVE ANY RIGHT IN THE CLIENT SECURITY FUND AS A THIRD PARTY BENEFICIARY OR OTHERWISE."

(c) The application shall be filed in the office of the State Bar in Raleigh, North Carolina, attention Client Security Fund Board, and a copy shall be transmitted by such office to the chairperson of the board.

History Note: Authority - Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984

Readopted Effective December 8, 1994

#### .1418 Processing Applications

(a) The board shall cause an investigation of all applications filed with the State Bar to determine whether the application is for a reimbursable loss and the extent, if any, to which the application should be paid from the Fund.

(b) The chairperson of the board shall assign each application to a member of the board for review and report. Wherever possible, the member to whom such application is referred shall practice in the county wherein the attorney practices or practiced.

(c) A copy of the application shall be served upon or sent by registered mail to the last known address of the attorney who it is alleged committed an act of dishonest conduct.

(d) After considering a report of investigation as to an application, any board member may request that testimony be presented concerning the application. In all cases, the alleged defalcating attorney or his or her representative will be given an opportunity to be heard by the board if the attorney so requests.

(e) The board shall operate the Fund so that, taking into account assessments ordered by the Supreme Court but not yet received and anticipated investment earnings, a principal balance of approximately \$1,000,000 is maintained. Subject to the foregoing, the board shall, in its discretion, determine the amount of loss, if any, for which each applicant should be reimbursed from the Fund. In making such determination, the board shall consider, *inter alia*, the following:

(1) the negligence, if any, of the applicant which contributed to the loss;

(2) the comparative hardship which the applicant suffered because of the loss;

(3) the total amount of reimbursable losses of applicants on account of any one attorney or firm or association of attorneys;

(4) the total amount of reimbursable losses in previous years for which total reimbursement has not been made and the total assets of the Fund;

(5) the total amount of insurance or other source of funds available to compensate the applicant for any reimbursable loss.

(f) The board may, in its discretion, allow further reimbursement in any year of a reimbursable loss reimbursed in part by it in prior years.

(g) Provided, however, and the foregoing notwithstanding, in no case shall the Fund reimburse the otherwise reimbursable losses sustained

(1) by any one applicant as a result of the dishonest conduct of one attorney in an amount in excess of \$60,000, or

(2) by all applicants as the result of the dishonest conduct of one attorney in amounts, in the aggregate, in excess of \$100,000. The foregoing limitations shall apply in those cases in which the first claim alleging dishonest conduct of an attorney is filed after June 26, 1992.

(h) No reimbursement shall be made to any applicant unless reimbursement is approved by a majority vote of the entire board at a duly held meeting at which a quorum is present.

(i) No attorney shall be compensated by the board for prosecuting an application before it.

(j) An applicant may be advised of the status of the board's consideration of the application and shall be advised of the final determination of the board.

(k)(1) If the board receives, or believes that it may receive, claims from more than one applicant based upon alleged dishonest conduct of one attorney in amounts, in the aggregate, exceeding \$100,000, the board may, in its discretion, publish written notice (the "notice") in a newspaper published, or of general circulation, in the county in which the attorney whose dishonest conduct is the subject of such claims maintained such attorney's last known office. Such notice shall state that any claim based on the alleged dishonest conduct of such attorney must be presented in writing to the board within one year following the first date of publication of the notice or such claims will be barred. The notice shall be substantially in the following form:

Before the Client Security Fund of the North Carolina State Bar  
In the Matter of (NAME OF ATTORNEY)

Notice of Deadline for Claims

NOTICE IS HEREBY GIVEN that the Board of Trustees (the "board") of the Client Security Fund (the "Fund") of the North Carolina State Bar will consider claims for reimbursement of losses sustained by clients of [NAME OF ATTORNEY], who formerly maintained an office for the practice of law at [OFFICE ADDRESS]. If you have or believe you may have sustained a loss as a result of dishonest conduct of [NAME OF ATTORNEY], you should promptly contact the Fund by calling or writing: The Client Security Fund P.O. Box 25908 Raleigh, NC 27611 Tel: 919/828-4620

Any claim must be filed in writing on forms available upon request from the Fund on or before [DATE WHICH IS ONE YEAR FOLLOWING DATE NOTICE IS PUBLISHED]. Any claims not filed on or before such date shall be barred and not be considered by the board. Reimbursement of losses is a matter of grace in the sole discretion of the board and not a matter of right.

This the \_\_\_\_\_ day of [MONTH], [YEAR].

By order of the Board of Trustees

/s/ [NAME], Secretary

The Client Security Fund of the North Carolina State Bar

(2) If the notice is published as provided herein, the board shall not reimburse any applicants for claims based upon alleged dishonest conduct of the attorney named in the notice until after the expiration of the deadline for filing written claims stated in the notice.

(3) If the notice is published as provided herein, after expiration of the deadline for claims stated in the notice, the board shall consider all claims properly filed on or before the deadline based upon alleged dishonest conduct of the attorney named in the notice. If such claims as finally approved for reimbursement by the board, in the aggregate, exceed \$100,000, the board shall cause to be disbursed to each applicant a *pro rata* portion of \$100,000 determined by multiplying \$100,000 by a fraction, the numerator of which is the amount of the claim of each applicant finally determined by the board to be a reimbursable loss in accordance with these rules and the denominator of which is the total amount of all claims finally determined by the board to be reimbursable losses resulting from the dishonest conduct of the attorney named in the notice, subject to the limitation that the board shall not reimburse any applicant in an amount in excess of \$60,000.

(4) If the notice is published as provided herein, the board shall not consider any claim filed after the deadline based upon alleged dishonest conduct of the attorney named in the notice, but shall inform the

applicant or any attorney representing the applicant that the claim is barred and the board is prohibited from considering such claim by reason of failure to file such claim within the time allowed.

(5) The board shall request that the State Bar include in any press releases announcing the institution of proceedings before, or the imposition of discipline by, the Disciplinary Hearing Commission based upon dishonest conduct of an attorney, a statement reading as follows:

"Clients of a North Carolina lawyer whose money or property is shown to have been misappropriated or embezzled by that lawyer may, if timely application is filed, be able to obtain full or partial reimbursement from the Client Security Fund of the North Carolina State Bar, which can be contacted by writing P.O. Box 25908, Raleigh, NC 27611 or calling 919/828-4620."

The provisions of Rule .1418(k)(1) through(4) above shall be effective notwithstanding the failure of such statement to be included in any press release.

(l) All applications, proceedings, investigations, and reports involving applicants for reimbursement shall be kept confidential until and unless the board authorizes reimbursement to the applicant, or the attorney alleged to have engaged in dishonest conduct requests that the matter be made public. All participants involved in an application, investigation, or proceeding (including the applicant) shall conduct themselves so as to maintain the confidentiality of the application, investigation or proceeding. This provision shall not be construed to deny relevant information to be provided by the board to disciplinary committees or to anyone else to whom the council authorizes release of information.

(m) The board may, in its discretion, for newly discovered evidence or other compelling reason, grant a request to reconsider any application which the board has denied in whole or in part; otherwise, such denial is final and no further consideration shall be given by the board to such application or another application upon the same alleged facts.

History Note: Authority - Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984

Readopted Effective December 8, 1994

#### **.1419 Subrogation for Reimbursement**

(a) In the event reimbursement is made to an applicant, the State Bar shall be subrogated to the amount reimbursed and may bring an action against the attorney or the attorney's estate either in the name of the applicant or in the name of the State Bar. As a condition of reimbursement, the applicant may be required to execute a "subrogation agreement" to such effect. Filing of an application constitutes an agreement by the applicant that the North Carolina State Bar shall be subrogated to the rights of the applicant to the extent of any reimbursement. Upon commencement of an action by the State Bar pursuant to its subrogation rights, it shall advise the reimbursed applicant at his or her last known address. A reimbursed applicant may then join in such action to recover any loss in excess of the amount reimbursed by the Fund. Any amounts recovered from the attorney by the board in excess of the amount to which the Fund is subrogated, less the board's actual costs of such recovery, shall be paid to or retained by the applicant as the case may be.

(b) Before receiving a payment from the Fund, the person who is to receive such payment or his or her legal representative shall execute and deliver to the board a written agreement stating that in the event the reimbursed applicant or his or her estate should ever receive any restitution from the attorney or his or her estate, the reimbursed applicant agrees that the Fund shall be repaid up to the amount of the reimbursement from the Fund plus expenses.

History Note: Authority - Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984

Readopted Effective December 8, 1994

#### **.1420 Authority Reserved by the Supreme Court**

The Fund may be modified or abolished by the Supreme Court. In the event of abolition, all assets of the Fund shall be disbursed by order of the Supreme Court.

History Note: Authority - Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984

Readopted Effective December 8, 1994

### **Section .1500 Rules Governing the Administration of the Continuing Legal Education Program**

#### **.1501 Purpose and Definitions**

##### **(a) Purpose**

The purpose of these continuing legal education rules is to assist lawyers licensed to practice and practicing law in North Carolina in achieving and maintaining professional competence for the benefit of the public whom they serve. The North Carolina State Bar, under Chapter 84 of the General Statutes of North Carolina, is charged with the responsibility of providing rules of professional conduct and with disciplining attorneys who do not comply with such rules. The Rules of Professional Conduct adopted by the North Carolina State Bar and approved by the Supreme Court of North Carolina require that lawyers adhere to important ethical standards, including that of rendering competent legal services in the representation of their clients.

At a time when all aspects of life and society are changing rapidly or becoming subject to pressures brought about by change, laws and legal principles are also in transition (through additions to the body of law, modifications and amendments) and are increasing in complexity. One cannot render competent legal services without continuous education and training.

The same changes and complexities, as well as the economic orientation of society, result in confusion about the ethical requirements concerning the practice of law and the relationships it creates. The data accumulated in the discipline program of the North Carolina State Bar argue persuasively for the establishment of a formal program for continuing and intensive training in professional responsibility and legal ethics.

It has also become clear that in order to render legal services in a professionally responsible manner, a lawyer must be able to manage his or her law practice competently. Sound management practices enable lawyers to concentrate on their clients' affairs while avoiding the ethical problems which can be caused by disorganization. These rules therefore provide for the administration of a law practice assistance program which is expected to emphasize training in law office management.

It is in response to such considerations that the North Carolina State Bar has adopted these minimum continuing legal education requirements. The purpose of these minimum continuing legal education requirements is the same as the purpose of the Rules of Professional Conduct themselves--to ensure that the public at large is served by lawyers who are competent and maintain high ethical standards.

##### **(b) Definitions**

(1) "Accredited sponsor" shall mean an organization whose entire continuing legal education program has been accredited by the Board of Continuing Legal Education.

(2) "Active member" shall include any person who is licensed to practice law in the state of North Carolina and who is an active member of the North Carolina State Bar.

(3) "Approved activity" shall mean a specific, individual legal education activity presented by an accredited sponsor or presented by other than an accredited sponsor if such activity is approved as a legal education activity under these rules by the Board of Continuing Legal Education.

(4) "Board" means the Board of Continuing Legal Education created by these rules.

(5) "Continuing legal education" or "CLE" is any legal, judicial or other educational activity accredited by the board. Generally, CLE will include educational activities designed principally to maintain or advance the professional competence of lawyers and/or to expand an appreciation and understanding of the professional responsibilities of lawyers.

(6) "Council" shall mean the North Carolina State Bar Council.

(7) "Credit hour" means an increment of time of 60 minutes which may be divided into segments of 30 minutes or 15 minutes, but no smaller.

(8) "Inactive member" shall mean a member of the North Carolina State Bar who is on inactive status.

(9) "In-house continuing legal education" shall mean courses or programs offered or conducted by law firms, either individually or in connection with other law firms, corporate legal departments, or similar entities primarily for the education of their members. The board may exempt from this definition those programs which it finds

(A) to be conducted by public or quasi-public organizations or associations for the education of their employees or members;

(B) to be concerned with areas of legal education not generally offered by sponsors of programs attended by lawyers engaged in the private practice of law.

(10) "Law practice assistance program" shall mean a program administered by the board to provide training in the area of law office management.

(11) "Membership and Fees Committee" shall mean the Membership and Fees Committee of the North Carolina State Bar.

(12) A "newly admitted active member" is one who becomes an active member of the North Carolina State Bar for the first time, has been reinstated, or has changed from inactive to active status.

(13) "Practical skills courses" are those courses which are devoted primarily to instruction of basic practice procedures and techniques of law as distinct from substantive law. Examples of such courses would include preparation of legal documents and correspondence, and development of specific basic lawyering skills, such as voir dire, jury argument, introducing evidence, and efficient management of a law office.

(14) "Professional responsibility" shall mean those courses or segments of courses devoted to a) the substance, the underlying rationale, and the practical application of the Rules of Professional Conduct; and b) the professional obligations of the attorney to the client, the court, the public, and other lawyers. This definition shall be interpreted consistent with the provisions of Rule .1501(b)(5) above.

(15) "Rules" shall mean the provisions of the continuing legal education rules established by the Supreme Court of North Carolina (Section .1500 of this subchapter).

(16) "Sponsor" is any person or entity presenting or offering to present one or more continuing legal education programs, whether or not an accredited sponsor.

(17) "Year" shall mean calendar year.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711. Readopted Effective December 8, 1994

## **.1502 Jurisdiction: Authority**

The Council of the North Carolina State Bar hereby establishes the Board of Continuing Legal Education (board) as a standing committee of the council, which board shall have authority to establish regulations governing a continuing legal education program and a law practice assistance program for attorneys licensed to practice law in this state.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

## **.1503 Operational Responsibility**

The responsibility for operating the continuing legal education program and the law practice assistance program shall rest with the board, subject to the statutes governing the practice of law, the authority of the council, and the rules of governance of the board.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

## **.1504 Size of Board**

The board shall have nine members, all of whom must be attorneys in good standing and authorized to practice in the state of North Carolina.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

## **.1505 Lay Participation**

The board shall have no members who are not licensed attorneys.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

## **.1506 Appointment of Members; When; Removal**

The members of the board shall be appointed by the council. The first members of the board shall be appointed as of the quarterly meeting of the council following the creation of the board. Thereafter, members shall be appointed annually as of the same quarterly meeting. Vacancies occurring by reason of death, resignation, or removal shall be filled by appointment of the council at the next quarterly meeting following the event giving rise to the vacancy, and the person so appointed shall serve for the balance of the vacated term. Any member of the board may be removed at any time by an affirmative vote of a majority of the members of the council in session at a regularly called meeting.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

## **.1507 Term of Office**

Each member who is appointed to the board shall serve for a term of three years beginning as of the first day of the month following the date on which the appointment is made by the council. See, however, Rule .1508 of this subchapter.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

## **.1508 Staggered Terms**

It is intended that members of the board shall be elected to staggered terms such that three members are appointed in each year. Of the initial board, three members shall be elected to terms of one year, three members shall be elected to terms of two years, and three members shall be elected to terms of three years. Thereafter, three members shall be elected each year.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

## **.1509 Succession**

Each member of the board shall be entitled to serve for one full three-year term and to succeed himself or herself for one additional three-year term. Thereafter, no person may be reappointed without having been off the board for at least three years.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

### **.1510 Appointment of Chairperson**

The chairperson of the board shall be appointed from time to time as necessary by the council. The term of such individual as chairperson shall be one year. The chairperson may be reappointed thereafter during his or her tenure on the board. The chairperson shall preside at all meetings of the board, shall prepare and present to the council the annual report of the board, and generally shall represent the board in its dealings with the public.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

### **.1511 Appointment of Vice-Chairperson**

The vice-chairperson of the board shall be appointed from time to time as necessary by the council. The term of such individual as vice-chairperson shall be one year. The vice-chairperson may be reappointed thereafter during tenure on the board. The vice-chairperson shall preside at and represent the board in the absence of the chairperson and shall perform such other duties as may be assigned to him or her by the chairperson or by the board.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

### **.1512 Source of Funds**

(a) Funding for the program carried out by the board shall come from sponsor's fees and attendee's fees as provided below, as well as from duly assessed penalties for noncompliance and from reinstatement fees.

(1) Accredited sponsors located in North Carolina (for courses offered within or outside North Carolina), or accredited sponsors not located in North Carolina (for courses given in North Carolina), or unaccredited sponsors located within or outside of North Carolina (for accredited courses within North Carolina) shall, as a condition of conducting an approved activity, agree to remit a list of North Carolina attendees and to pay a fee for each active member of the North Carolina State Bar who attends the program for CLE credit. The sponsor's fee shall be based on each credit hour of attendance, with a proportional fee for portions of a program lasting less than an hour. The fee shall be set by the board upon approval of the council. Any sponsor, including an accredited sponsor, which conducts an approved activity which is offered without charge to attendees shall not be required to remit the fee under this section. Attendees who wish to receive credit for attending such an approved activity shall comply with Rule .1512(a)(2) below.

(2) The board shall fix a reasonably comparable fee to be paid by individual attorneys who attend for CLE credit approved continuing legal education activities for which the sponsor does not submit a fee under Rule .1512(a)(1) above. Such fee shall accompany the member's annual affidavit. The fee shall be set by the board upon approval of the council.

(b) Funding for a law practice assistance program shall be from user fees set by the board upon approval of the council and from such other funds as the council may provide.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

### **.1513 Fiscal Responsibility**

All funds of the board shall be considered funds of the North Carolina State Bar and shall be administered and disbursed accordingly.

(a) Maintenance of Accounts: Audit - The North Carolina State Bar shall maintain a separate account for funds of the board such that such funds and expenditures therefrom can be readily identified. The accounts of the board shall be audited on an annual basis in connection with the audits of the North Carolina State Bar.

(b) Investment Criteria - The funds of the board shall be handled, invested and reinvested in accordance with investment policies adopted by the council for the handling of dues, rents, and other revenues received by the North Carolina State Bar in carrying out its official duties.

(c) Disbursement - Disbursement of funds of the board shall be made by or under the direction of the secretary-treasurer of the North Carolina State Bar pursuant to authority of the council. The members of the board shall serve on a voluntary basis without compensation, but may be reimbursed for the reasonable expenses incurred in attending meetings of the board or its committees.

(d) All revenues resulting from the CLE program, including fees received from attendees and sponsors, late filing penalties, late compliance fees, reinstatement fees, and interest on a reserve fund shall be applied first to the expense of administration of the CLE program including an adequate reserve fund. Excess funds may be expended by the council on lawyer competency programs approved by the council.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

### **.1514 Meetings**

The annual meeting of the board shall be held in October of each year in connection with the annual meeting of the North Carolina State Bar. The board by resolution may set regular meeting dates and places. Special meetings of the board may be called at any time upon notice given by the chairperson, the vice-chairperson, or any two members of the board. Notice of meeting shall be given at least two days prior to the meeting by mail, telegram, facsimile transmission or telephone. A quorum of the board for conducting its official business shall be a majority of the members serving at a particular time.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

### **.1515 Annual Report**

The board shall prepare at least annually a report of its activities and shall present the same to the council one month prior to its annual meeting.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

### **.1516 Powers and Duties of the Board**

The board shall have the following powers and duties:

(1) to exercise general supervisory authority over the administration of these rules;

(2) to adopt and amend regulations consistent with these rules with the approval of the council;

(3) to establish an office or offices and to employ such persons as the board deems necessary for the proper administration of these rules, and to delegate to them appropriate authority, subject to the review of the council;

(4) to report annually on the activities and operations of the board to the council and make any recommendations for changes in the rules or methods of operation of the continuing legal education program;

(5) to submit an annual budget to the council for approval and to ensure that expenses of the board do not exceed the annual budget approved by the council;

(6) to administer a law office assistance program for the benefit of lawyers who request or are required to obtain training in the area of law office management.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

### **.1517 Scope and Exemptions**

(a) Except as provided herein these rules shall apply to every active member licensed by the North Carolina State Bar.

(b) The governor, the lieutenant governor, and all members of the council of state, all members of the federal and state judiciary, members of the United States Senate, members of the United States House of Representatives, members of the North Carolina General Assembly and members of the United States Armed Forces on full-time active duty are exempt. All active members, including members of the judiciary, who are exempt are encouraged to attend and participate in legal education programs.

(c) Any active member residing outside of North Carolina or any active member residing inside North Carolina who is a full-time teacher at the Institute of Government of the University of North Carolina at Chapel Hill or at a law school in North Carolina accredited by the American Bar Association and who in each case neither practices in North Carolina nor represents North Carolina clients on matters governed by North Carolina law shall be exempt from the requirements of these rules upon written application to the board. Such application shall be filed on or before the due date for the payment of annual dues, or sooner as the circumstances may require, and shall be in effect for the year for which the application was made.

(d) The board may exempt an active member from the continuing legal education requirements for a period of not more than one year at a time upon a finding by the board of special circumstances unique to that member constituting undue hardship or other reasonable basis for exemption, or for a longer period upon a finding of a permanent disability.

(e) Nonresident attorneys from other jurisdictions who are temporarily admitted to practice in a particular case or proceeding pursuant to the provisions of G.S. 84-4.1 shall not be subject to the requirements of these rules.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

### **.1518 Continuing Legal Education Program**

(a) Each active member subject to these rules shall complete 12 hours of approved continuing legal education during each calendar year beginning January 1, 1988, as provided by these rules and the regulations adopted thereunder.

(b) Of the 12 hours

(1) at least 2 hours shall be devoted to the area of professional responsibility; and

(2) at least once every three calendar years, each member shall be required to attend a specially designed three-hour block course of instruction devoted exclusively to the area of professional responsibility which will satisfy the requirement of Rule .1518(b)(1) above.

(c) During each of the first three years of admission, newly admitted active members shall be required to take a minimum of 9 of the 12 hours of continuing legal education in practical skills courses. The board may provide by regulation for exempting newly admitted members with prior experience as practicing lawyers from the requirements of this paragraph.

(d) Members may carry over up to 12 credit hours earned in one calendar year to the next calendar year, which may include those hours required by Rule .1518(b)(1) above, but may not include those hours required by Rule .1518(b)(2) above. Additionally, a newly admitted active member may include as credit hours which may be carried over to the next succeeding year, any approved CLE hours earned after that member's graduation from law school.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

### **.1519 Accreditation Standards**

The board shall approve continuing legal education activities which meet the following standards and provisions.

(1) They shall have significant intellectual or practical content and the primary objective shall be to increase the participant's professional competence and proficiency as a lawyer.

(2) They shall constitute an organized program of learning dealing with matters directly related to the practice of law, professional responsibility or ethical obligations of lawyers.

(3) Credit may be given for continuing legal education activities where live instruction is used or mechanically or electronically recorded or reproduced material is used, including videotape or satellite transmitted programs.

(4) Continuing legal education materials are to be prepared, and activities conducted, by an individual or group qualified by practical or academic experience in a setting physically suitable to the educational activity of the program and equipped with suitable writing surfaces or sufficient space for taking notes.

(5) Thorough, high quality, and carefully prepared written materials should be distributed to all attendees at or before the time the course is presented. It is recognized that written materials are not suitable or readily available for some types of subjects. The absence of written materials for distribution should, however, be the exception and not the rule.

(6) Any accredited sponsor must remit fees as required and keep and maintain attendance records of each continuing legal education program sponsored by it, which shall be furnished to the board in accordance with regulations.

(7) In-house continuing legal education and self-study shall not be approved or accredited for the purpose of complying with Rule .1518 of this subchapter.

(8) Programs that cross academic lines, such as accounting-tax seminars, may be considered for approval by the board. However, the board must be satisfied that the content of the activity would enhance legal skills or the ability to practice law.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

### **.1520 Accreditation of Sponsors and Programs**

(a) An organization desiring accreditation as an accredited sponsor of courses, programs, or other continuing legal education activities may apply for accredited sponsor status to the board. The board shall approve a sponsor as an accredited sponsor if it is satisfied that the sponsor's programs have met the standards set forth in Rule .1519 of this subchapter and regulations established by the board.

(b) Once an organization has been accredited as an accredited sponsor, then the continuing legal education programs sponsored by that organization are presumptively approved for credit, provided that the standards set out in Rule .1519 of this subchapter and the provisions of Rule .1512 of this subchapter are met. The board may at any time reevaluate and grant or revoke the presumptive approval status of an accredited sponsor.

(c) Any organization not accredited as an accredited sponsor which desires approval of a course or program shall apply to the board which shall adopt regulations to administer the accreditation of such programs consistent with the provisions of Rule .1519 of this subchapter. Applicants denied approval of a program may request reconsideration of such a decision by submitting a letter of appeal to the board within 15 days of receipt of the notice of disapproval. The decision by the board on an appeal is final.

(d) An active member desiring approval of a course or program which has not otherwise been approved shall apply to the board which shall adopt regulations to administer approval requests consistent with the requirements of Rule .1519 of this subchapter. Applicants denied approval of a program may request reconsideration of such a decision by submit-

ting a letter of appeal to the board within 15 days of the receipt of the notice of disapproval. The decision by the board on an appeal is final.

(c) The board may provide by regulation for an announcement of accreditation for an approved continuing legal education program.

(f) The board may provide by regulation for the accredited sponsor, sponsor, or active member for whom a continuing legal education program has been approved to maintain and provide such records as required by the board.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

#### **.1521 Credit Hours**

The board may designate by regulation the number of credit hours to be earned by participation, including, but not limited to, teaching, in continuing legal education activities approved by the board.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

#### **.1522 Annual Report**

Commencing in 1989, each active member of the North Carolina State Bar shall make an annual written report to the North Carolina State Bar in such form as the board shall prescribe by regulation concerning compliance with the continuing legal education program for the preceding year or declaring an exemption under Rule .1517 of this subchapter, unless the board's records indicate that such member has been previously exempted and the circumstances resulting in the exemption are unchanged. It shall be the responsibility of any previously exempted member whose circumstances have changed and who is therefore not presently qualified for an exemption to notify the board of such changed circumstances within 30 days after such become apparent and to satisfy fully the requirements of these rules for the year following such change in circumstances.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

#### **.1523 Noncompliance**

(a) An attorney who is required to file a report of CLE credits and does not do so or who fails to meet the minimum requirements of these rules, including the payment of duly assessed penalties and attendee fees, may be suspended from the practice of law in the state of North Carolina.

(b) The board shall notify an attorney who appears to have failed to meet the requirements of these rules that the attorney will be suspended from the practice of law in this state, unless the attorney shows good cause why the suspension should not be made or the attorney shows that he or she has complied with the requirements within a 90-day period after receiving the notice. Notice shall be forwarded to the attorney's address as shown in the records of the North Carolina State Bar by certified mail. Ninety-three days after mailing such notice, if no affidavit is filed with the board by the attorney attempting to show good cause or attempting to show that the attorney has complied with the requirements of these rules, the attorney's license shall be suspended by order of the North Carolina State Bar.

(c) If the attorney responds to the notice, the board shall review all affidavits and other documents filed by the attorney to determine whether good cause has been shown or to determine whether the attorney has complied with the requirements of these rules within the 90-day period. If the board determines that good cause has been shown or that the attorney is in compliance with these rules, it shall enter an appropriate order. If the board determines that good cause has not been shown and that the attorney has not shown compliance with these rules within the 90-day period, then the board shall refer the matter to the council for determination after hearing by the Membership and Fees Committee. If the council, af-

ter hearing by the Membership and Fees Committee, shall determine that the attorney has not complied with these rules and that good cause therefore has not been shown, it shall suspend the attorney's license to practice law in North Carolina until compliance is shown. The procedures to be followed by the council and the Membership and Fees Committee shall be the same as those followed when the council and the Membership and Fees Committee consider whether to suspend an attorney's license for the nonpayment of dues.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711. Readopted Effective December 8, 1994

#### **.1524 Reinstatement**

Any member who has been suspended for noncompliance may be reinstated upon recommendation of the board upon a showing that the member's continuing legal education deficiency has been cured. The member shall file a petition with the board seeking reinstatement in which the member shall state with particularity the accredited legal education courses which the member has attended and the number of credit hours obtained since the last reporting period prior to the member's suspension. The petition shall be accompanied by a reinstatement fee, the amount of which shall be determined by the board upon approval of the council. Within 30 days of the receipt of the petition for reinstatement, the board shall determine whether the deficiency has been cured. If the board finds that the deficiency has been cured and the reinstatement fee paid, the board shall advise the secretary of the North Carolina State Bar who shall issue an order of reinstatement. If the board determines that the deficiency has not been cured or that the reinstatement fee has not been paid, the board shall refer the matter to the Membership and Fees Committee for hearing. Any member who complies with the requirements of the rules during the 90-day probationary period under Rule .1523(b) of this subchapter shall pay a late compliance fee, the amount of which shall be determined by the board upon approval of the council.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

#### **.1525 Confidentiality**

Unless otherwise directed by the Supreme Court of North Carolina, the files, records, and proceedings of the board, as they relate to or arise out of any failure of any active member to satisfy the requirements of these rules shall be deemed confidential and shall not be disclosed, except in furtherance of the duties of the board or upon the request of the active member affected or as they may be introduced in evidence or otherwise produced in proceedings under these rules.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

#### **.1526 Effective Date**

(a) The effective date of these rules shall be January 1, 1988.

(b) Active members licensed prior to July 1 of any calendar year shall meet the continuing legal education requirements of these rules for such year.

(c) Active members licensed after June 30 of any calendar year must meet the continuing legal education requirements of these rules for the next calendar year.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

#### **.1527 Regulations**

The following regulations (Section .1600 of the Rules of the North Carolina State Bar) for the continuing legal education program are hereby adopted and shall remain in effect until revised or amended by the board with the approval of the council. The board may adopt other

regulations to implement the continuing legal education program with the approval of the council.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

## **Section .1600 Regulations Governing the Administration of the Continuing Legal Education Program**

### **.1601 Organization**

(a) Quorum - Five members shall constitute a quorum of the board.

(b) The Executive Committee - The executive committee of the board shall be comprised of the chairperson, a vice-chairperson elected by the members of the board, and a member to be appointed by the chairperson. Its purpose is to conduct all necessary business of the board that may arise between meetings of the full board. In such matters it shall have complete authority to act for the board.

(c) Other Committees - The chairperson may appoint from time to time any committees he or she deems advisable of not less than three members for the purpose of considering and deciding matters submitted to them.

(d) Definitions - As used herein, "board" means the Board of Continuing Legal Education, "CLE" means continuing legal education, and "rules" means the rules for the continuing legal education program adopted by the Supreme Court of North Carolina (Section .1500 of this subchapter). All other definitions shall be as set forth in the rules.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

### **.1602 General Course Approval**

(a) Law School Courses - Courses offered by an ABA accredited law school with respect to which academic credit may be earned may be approved activities. Computation of CLE credit for such courses shall be as prescribed in Rule .1605(a) of this subchapter. No more than 12 CLE hours in any year may be earned by such courses. No credit is available for law school courses attended prior to becoming an active member of the North Carolina State Bar.

(b) Bar Review/Refresher Course - Courses designed to review or refresh recent law school graduates or attorneys in preparation for any bar exam shall not be approved for CLE credit.

(c) Approval - CLE activities may be approved upon the written application of a sponsor, other than an accredited sponsor, on an individual program basis or of an active member on an individual program basis. An application for such CLE course approval shall meet the following requirements:

(1) If advance approval is requested by a sponsor, the application and supporting documentation, including two substantially complete sets of the written materials to be distributed at the course or program, shall be submitted at least 45 days prior to the date on which the course or program is scheduled. If advance approval is requested by an active member, the application need not include a complete set of written materials.

(2) In all other cases, the application and supporting documentation shall be submitted not later than 45 days after the date the course or program was presented or prior to the end of the calendar year in which the course or program was presented, whichever is earlier.

(3) The application shall be submitted on a form furnished by the board.

(4) The application shall contain all information requested on the form.

(5) The application shall be accompanied by a course outline or brochure that describes the content, identifies the teachers, lists the time devoted to each topic and shows each date and location at which the program will be offered.

(6) The application shall include a detailed calculation of the total CLE hours and hours of professional responsibility.

(d) Course Quality - The application and materials provided shall reflect that the program to be offered meets the requirements of Rule .1519 of this subchapter. Written materials consisting merely of an outline without citation or explanatory notations generally will not be sufficient for approval. Any sponsor, including an accredited sponsor, who expects to conduct a CLE activity for which suitable written materials will not be made available to all attendees may obtain approval for that activity only by application to the board at least 45 days in advance of the presentation showing why written materials are not suitable or readily available for such a program.

(e) Records - Sponsors, including accredited sponsors, shall within 30 days after the course is concluded

(1) furnish to the board a list in alphabetical order, on magnetic tape if available, of the names of all North Carolina attendees and their North Carolina State Bar membership numbers;

(2) remit to the board the appropriate sponsor fee;

(3) furnish to the board a complete set of all written materials distributed to attendees at the course or program.

(f) Announcement - Accredited sponsors and sponsors who have advanced approval for courses may include in their brochures or other course descriptions the information contained in the following illustration:

This course [or seminar or program] has been approved by the Board of Continuing Legal Education of the North Carolina State Bar for continuing legal education credit in the amount of \_\_\_\_ hours, of which \_\_\_\_ hours will also apply in the area of professional responsibility. This course is not sponsored by the board.

(g) Notice - Sponsors not having advanced approval shall make no representation concerning the approval of the course for CLE credit by the board. The board will mail a notice of its decision on CLE activity approval requests within 15 days of their receipt when the request for approval is submitted before the program and within 30 days when the request is submitted after the program. Approval thereof will be deemed if the notice is not timely mailed. This automatic approval will not operate if the sponsor contributes to the delay by failing to provide the complete information requested by the board or if the board timely notifies the sponsor that the matter has been tabled and the reason therefor.

(h) In-House CLE and Self-Study - No approval will be provided for in-house CLE or self-study by attorneys, except those programs exempted by the board under Rule .1501(b)(9) of this subchapter.

(i) Facilities - Sponsors ordinarily must provide a facility with adequate lighting and temperature control ventilation. For a nonclinical CLE activity, the facility should be set up in classroom or similar style to provide a writing surface for each preregistered attendee or sufficient space for taking notes, and shall provide sufficient space between the chairs in each row to permit easy access and exit to each seat. Crowding in the facility detracts from the learning process and will not be permitted.

(j) Course Materials - In addition to the requirements of Rule .1602(c) and (e) above, sponsors, including accredited sponsors, and active members seeking credit for an approved activity shall furnish upon request of the board a copy of all materials presented and distributed at a CLE course or program.

(k) Nonlegal Educational Activities - Except in extraordinary circumstances, approval will not be given for general and personal educational activities. For example, the following types of courses will not receive approval:

(1) courses within the normal college curriculum such as English, history, social studies, and psychology;

(2) courses which deal with the individual lawyer's human development, such as stress reduction, quality of life, or substance abuse;

(3) courses which deal with the development of personal skills generally, such as public speaking (other than oral argument and courtroom presentation), nonlegal writing, and financial management;

(4) courses designed primarily to sell services or products or to generate greater revenue, such as marketing or advertising (as distinguished from courses dealing with development of law office procedures and management designed to raise the level of service provided to clients). A course or segment may be granted credit by the board when a bar organization's course trains volunteer attorneys in service to the profession if all segments of the course are devoted to CLE or professional responsibility, as such terms are defined in Rule .1501(b) of this subchapter, if such course or segment meets the standards of Section .1500 and Section .1600 of this subchapter, and if the sponsor represents that such course or segment meets these standards. No more than three hours of professional responsibility will be credited per training course.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

### **.1603 Accredited Sponsors**

In order to receive designation as an "accredited sponsor" of courses, programs or other continuing legal education activities under Rule .1520(a) of this subchapter, the application of the sponsor must meet the following requirements:

(1) The application for accredited sponsor status shall be submitted on a form furnished by the board.

(2) The application shall contain all information requested on the form.

(3) The application shall be accompanied by course outlines or brochures that describe the content, identify the instructors, list the time devoted to each topic, show each date and location at which three programs have been sponsored in each of the last three consecutive years, and enclose the actual course materials.

(4) The application shall include a detailed calculation of the total CLE hours specified in each of the programs sponsored by the organization.

(5) The application shall reflect that the previous programs offered by the organization in continuing legal education have been of consistently high quality and would otherwise meet the standards set forth in Rule .1519 of this subchapter.

(6) Notwithstanding the provisions of Rule .1603 (3),(4) and (5) above, any law school which has been approved by the North Carolina State Bar for purposes of qualifying its graduates for the North Carolina bar examination, may become an accredited sponsor upon application to the board.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711. Readopted Effective December 8, 1994

### **.1604 Accreditation of Videotape or Other Audiovisual Programs**

(a) The board may permit an active member to receive credit for attendance at, or participation in, videotape presentations or where audio-visual recorded or reproduced material is used.

(b) An attorney attending such a presentation is entitled to credit hours if

(1) the presentation from which the program is made would, if attended by an active member, be an accredited course;

(2) all other conditions imposed by the rules in Section .1600 of this subchapter, or by the board in advance, are met.

(c) Unless the entire program has been produced by an accredited sponsor, the person or organization sponsoring the program must receive advance approval and accreditation from the board. Board Form 2 may be utilized for this purpose.

(d) To receive approval for attendance at such programs, the following conditions must be met:

(1) The person or organization sponsoring the program must keep accurate records of attendance, and must forward a copy of the record of attendance of active members to the board within 30 days after presentation of the videotape program is completed.

(2) Unless clearly inappropriate for the particular course, detailed papers, manuals, study materials, or written outlines are presented to the persons attending the program which substantially pertain to the subject matter of the program. Any materials made available to persons attending the course from which the program is made must be made available to those persons attending the program who desire to receive credit under these regulations.

(3) Attendance must be verified by a responsible party who is not attempting to earn credit hours by virtue of attendance at that presentation. Proof of attendance may be made by the verifying person on Board Form 5.

(4) A suitable classroom or rooms must be available for viewing the program and taking of notes.

(e) A minimum of five active members must physically attend the presentation of the program.

EXAMPLE (1): Attorney X, an active member, attends a videotape seminar sponsored by an accredited sponsor. If a person attending the program from which the videotape is made would receive credit, Attorney X is also entitled to receive credit, if the additional conditions under this Rule .1604 are also met.

EXAMPLE (2): Attorney Y, an active member, desires to attend a videotape program. However, the proposed videotape program (a) is not presented by an accredited sponsor, and (b) has not received individual course approval from the board. Attorney Y may not receive any credit hours for attending that videotape presentation without advance approval from the board.

EXAMPLE (3): Attorney Z, an active member, attends a videotape program. The presentation of the program from which the videotape was made has already been held and approved by the board for credit. However, no person is present at the videotape program to record attendance. Attorney Z may not obtain credit for viewing the videotape program unless it is viewed in the presence of a person who is not attending the videotape program for credit and who verifies the attendance of Attorney Z and of other attorneys at the program. All other conditions of this Rule .1604 must also be met.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

### **.1605 Computation of Credit**

(a) Computation Formula - CLE and professional responsibility hours shall be computed by the following formula:

$$\frac{\text{sum of the total minutes of actual instruction}}{60} = \text{Total Hours}$$

For example, actual instruction totaling 195 minutes would equal 3.25 hours toward CLE.

(b) Actual Instruction - Only actual education shall be included in computing the total hours of actual instruction. The following shall not be included:

(1) introductory remarks;

(2) breaks;

(3) business meetings;

(4) keynote speeches or speeches in connection with meals;

(5) questions and answer sessions at a ratio in excess of 15 minutes per CLE hour and programs less than 30 minutes in length.

(c) Teaching - As a contribution to professionalism, credit may be earned for teaching in an approved continuing legal education activity. Presentations accompanied by thorough, high quality, readable, and care-

fully prepared written materials will qualify for CLE credit on the basis of three hours of credit for each thirty minutes of presentation. Repeat presentations qualify for one-half of the credits available for the initial presentation. For example, an initial presentation of 45 minutes would qualify for 4.5 hours of credit.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711. Readopted Effective December 8, 1994

#### **.1606 Fees**

(a) Sponsor Fee - The sponsor fee, a charge paid directly by the sponsor, shall be paid by all sponsors of approved activities presented in North Carolina and by accredited sponsors located in North Carolina for approved activities wherever presented, except that no sponsor fee is required where approved activities are offered without charge to attendees. In any other instance, payment of the fee by the sponsor is optional. The amount of the fee is set at \$1.25 per approved CLE hour per active member of the North Carolina State Bar in attendance. The fee is computed as shown in the following formula and example which assumes a 6-hour course attended by 100 North Carolina lawyers seeking CLE credit:

Fee:  $\$1.25 \times \text{Total Approved CLE hours (x 6)} \times \text{Number of NC Attendees (100)} = \text{Total Sponsor Fee (\$750)}$

(b) Attendee Fee - The attendee fee is paid by the North Carolina attorney who requests credit for a program for which no sponsor fee was paid. An attorney should remit the fees along with his or her affidavit before February 28 following the calendar year for which the report is being submitted. The amount of the fee is set at \$1.25 per approved CLE hour for which the attorney claims credit. It is computed as shown in the following formula and example which assumes that the attorney attended an activity approved for 3 hours of CLE credit:

Fee:  $\$1.25 \times \text{Total Approved CLE hours (x 3.0)} = \text{Total Attendee Fee (\$3.75)}$

(c) Fee Review - The board will review the level of the fee at least annually and adjust it as necessary to maintain adequate finances for prudent operation of the board in a nonprofit manner. The fee charged to sponsors and attendees will be increased only to the extent necessary for those fees to pay the costs of administration of the CLE program.

(d) Uniform Application - The fee shall be applied uniformly without exceptions or other preferential treatment for a sponsor or attendee.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

#### **.1607 Special Cases and Exemptions**

(a) Attorneys who have a permanent disability which makes attendance at CLE programs inordinately difficult may file a request for a permanent substitute program in lieu of attendance and shall therein set out continuing legal education plans tailored to their specific interests and physical ability. The board shall review and approve or disapprove such plans on an individual basis and without delay.

(b) Other requests for substitute compliance, partial waivers, other exemptions for hardship or extenuating circumstances may be granted by the board on a yearly basis upon written application of the attorney.

(c) Credit is earned through service as a bar examiner of the North Carolina Board of Law Examiners. The board will award 12 hours of CLE credit for the preparation and grading of a bar examination by a member of the North Carolina Board of Law Examiners.

(d) Newly admitted active members who have previously been licensed to practice law in this state or in some other state and who have actually practiced law for a period of at least five years may apply to the board for an exemption from the practical skills requirement of Rule .1518(c) of this subchapter. This application must be filed prior to July 31 of the year for which the exemption is initially sought.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

#### **.1608 General Compliance Procedures**

(a) Affidavit - Prior to January 31 of each year, commencing in 1990, the prescribed affidavit form shall be mailed to all active members of the North Carolina State Bar concerning compliance with the continuing legal education program for the preceding year.

(b) Late Filing Penalty - Any attorney who, for whatever reasons, files the affidavit showing compliance or declaring an exemption after the February 28 due date shall pay a \$75.00 late filing penalty. This penalty shall be submitted with the affidavit. An affidavit that is either received by the board or postmarked on or before February 28 shall be considered to have been timely filed. An attorney who complies with the requirements of the rules during the probationary period under Rule .1523(c) of this subchapter shall pay a late compliance fee of \$125.00 pursuant to Rule .1524 of this subchapter.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

#### **.1609 Noncompliance Procedures**

(a) Reinstatement Fee - The uniform reinstatement fee is \$250 and must accompany the reinstatement petition.

(b) Policy - Reinstatement will be granted only upon a showing that the member has attended sufficient approved CLE activity to make up his or her previous deficiency.

(c) Petition - The petition for reinstatement shall list the CLE activities according to a form provided by the board.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

#### **.1610 Authority For Appeals**

(a) Appeals - Except as otherwise provided, the board is the final authority on all matters entrusted to it under Section .1500 and Section .1600 of this subchapter. Therefore, any decision by a committee of the board pursuant to a delegation of authority may be appealed to the full board.

(b) Procedure - A decision made by the staff of the board pursuant to a delegation of authority may also be reviewed by the full board but should first be appealed to any committee of the board having jurisdiction on the subject involved. All appeals shall be in writing. The board has the discretion to, but is not obligated to, grant a hearing in connection with any appeal regarding the accreditation of a program.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

### **Section .1700 The Plan of Legal Specialization**

#### **.1701 Purpose**

The purpose of this plan of certified legal specialization is to assist in the delivery of legal services to the public by identifying to the public those lawyers who have demonstrated special knowledge, skill, and proficiency in a specific field, so that the public can more closely match its needs with available services; and to improve the competency of the bar by establishing an additional incentive for lawyers to participate in continuing legal education and meet the other requirements of specialization.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### **.1702 Jurisdiction: Authority**

The Council of the North Carolina State Bar (the council) with the approval of the Supreme Court of North Carolina hereby establishes the Board of Legal Specialization (board) as a standing committee of the council, which board shall be the authority having jurisdiction under state law over the subject of specialization of lawyers.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.1703 Operational Responsibility**

The responsibility for operating the specialization program rests with the board, subject to the statutes governing the practice of law, the authority of the council and the rules of governance of the board.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.1704 Size of Board**

The board shall have nine members, six of whom must be attorneys in good standing and authorized to practice law in the state of North Carolina. The lawyer members of the board shall be representative of the legal profession and shall include lawyers who are in general practice as well as those who specialize.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.1705 Lay Participation**

The board shall have three members who are not licensed attorneys.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.1706 Appointment of Members; When; Removal**

The members of the board shall be appointed by the council. The first members of the board shall be appointed as of the quarterly meeting of the council following the creation of the board. Thereafter, members shall be appointed annually as of the same quarterly meeting. Vacancies occurring by reason of death, resignation, or removal shall be filled by appointment of the council at the next quarterly meeting following the event giving rise to the vacancy, and the person so appointed shall serve for the balance of the vacated term. Any member of the board may be removed at any time by an affirmative vote of a majority of the members of the council in session at a regularly called meeting.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.1707 Term of Office**

Each member who is appointed to the board shall serve for a term of three years beginning as of the first day of the month following the date on which the appointment is made by the council. See, however, Rule .1708 of this subchapter.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.1708 Staggered Terms**

It is intended that members of the board shall be elected to staggered terms such that three members are appointed in each year. Of the initial board, three members (two lawyers and one nonlawyer) shall be elected to terms of one year; three members (two lawyers and one nonlawyer) shall be elected to terms of two years; and three members (two lawyers and one nonlawyer) shall be elected to terms of three years. Thereafter, three members (two lawyers and one nonlawyer) shall be elected in each year.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.1709 Succession**

Each member of the board shall be entitled to serve for one full three-year term and to succeed himself or herself for one additional three-year term. Thereafter, no person may be reappointed without having been off of the board for at least three years.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.1710 Appointment of Chairperson**

The chairperson of the board shall be appointed from time to time as necessary by the council from among the lawyer members of the board.

The term of such individual as chairperson shall be one year. The chairperson may be reappointed thereafter during his or her tenure on the board. The chairperson shall preside at all meetings of the board, shall prepare and present to the council the annual report of the board, and generally shall represent the board in its dealings with the public.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.1711 Appointment of Vice-Chairperson**

The vice-chairperson of the board shall be appointed from time to time as necessary by the council from among the lawyer members of the board. The term of such individual as vice-chairperson shall be one year. The vice-chairperson may be reappointed thereafter during his or her tenure on the board. The vice-chairperson shall preside at and represent the board in the absence of the chairperson and shall perform such other duties as may be assigned to him or her by the chairperson or by the board.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.1712 Source of Funds**

Funding for the program carried out by the board shall come from such application fees, examination fees, course accreditation fees, annual fees or recertification fees as the board, with the approval of the council, may establish.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.1713 Fiscal Responsibility**

All funds of the board shall be considered funds of the North Carolina State Bar and shall be administered and disbursed accordingly.

(a) Maintenance of Accounts: Audit - The North Carolina State Bar shall maintain a separate account for funds of the board such that such funds and expenditures therefrom can be readily identified. The accounts of the board shall be audited on an annual basis in connection with the audits of the North Carolina State Bar.

(b) Investment Criteria - The funds of the board shall be handled, invested and reinvested in accordance with investment policies adopted by the council for the handling of dues; rents and other revenues received by the North Carolina State Bar in carrying out its official duties.

(c) Disbursement - Disbursement of funds of the board shall be made by or under the direction of the secretary-treasurer of the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.1714 Meetings**

The annual meeting of the board shall be held in October of each year in connection with the annual meeting of the North Carolina State Bar. The board by resolution may set regular meeting dates and places. Special meetings of the board may be called at any time upon notice given by the chairperson, the vice-chairperson or any two members of the board. Notice of meeting shall be given at least two days prior to the meeting by mail, telegram, facsimile transmission, or telephone. A quorum of the board for conducting its official business shall be four or more of the members serving at the time of the meeting.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.1715 Annual Report**

The board shall prepare at least annually a report of its activities and shall present same to the council one month prior to its annual meeting.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.1716 Powers and Duties of the Board**

Subject to the general jurisdiction of the council and the North Carolina Supreme Court, the board shall have jurisdiction of all matters per-

taining to regulation of certification of specialists in the practice of law and shall have the power and duty

- (1) to administer the plan;
- (2) subject to the approval of the council and the Supreme Court, to designate areas in which certificates of specialty may be granted and define the scope and limits of such specialties and to provide procedures for the achievement of these purposes;
- (3) to appoint, supervise, act on the recommendations of and consult with specialty committees as hereinafter identified;
- (4) to make and publish standards for the certification of specialists, upon the board's own initiative or upon consideration of recommendations made by the specialty committees, such standards to be designed to produce a uniform level of competence among the various specialties in accordance with the nature of the specialties;
- (5) to certify specialists or deny, suspend or revoke the certification of specialists upon the board's own initiative, upon recommendations made by the specialty committees or upon requests for review of recommendations made by the specialty committees;
- (6) to establish and publish procedures, rules, regulations, and bylaws to implement this plan;
- (7) to propose and request the council to make amendments to this plan whenever appropriate;
- (8) to cooperate with other boards or agencies in enforcing standards of professional conduct and to report apparent violations of the Rules of Professional Conduct to the appropriate disciplinary authority;
- (9) to evaluate and approve, or disapprove, any and all continuing legal education courses, or educational alternatives, for the purpose of meeting the continuing legal education requirements established by the board for the certification of specialists and in connection therewith to determine the specialties for which credit shall be given and the number of hours of credit to be given in cooperation with the providers of continuing legal education; to determine whether and what credit is to be allowed for educational alternatives, including other methods of legal education, teaching, writing and the like; to issue rules and regulations for obtaining approval of continuing legal education courses and educational alternatives; to publish or cooperate with others in publishing current lists of approved continuing legal education courses and educational alternatives; and to encourage and assist law schools, organizations providing continuing legal education, local bar associations and other groups engaged in continuing legal education to offer and maintain programs of continuing legal education designed to develop, enhance and maintain the skill and competence of legal specialists;
- (10) to cooperate with other organizations, boards and agencies engaged in the recognition of legal specialists or concerned with the topic of legal specialization;

(11) notwithstanding any conflicting provision of the certification standards for any area of specialty, to direct any of the specialty committees not to administer a specialty examination if, in the judgment of the board, there are insufficient applicants or such would otherwise not be in the best interest of the specialization program.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.1717 Retained Jurisdiction of the Council**

The council retains jurisdiction with respect to the following matters:

- (1) upon recommendation of the board, establishing areas in which certificates of specialty may be granted;
- (2) amending this plan;
- (3) hearing appeals taken from actions of the board;
- (4) establishing or approving fees to be charged in connection with the plan;
- (5) regulating attorney advertisements of specialization under the Rules of Professional Conduct.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.1718 Privileges Conferred and Limitations Imposed**

The board in the implementation of this plan shall not alter the following privileges and responsibilities of certified specialists and other lawyers.

(1) No standard shall be approved which shall in any way limit the right of a certified specialist to practice in all fields of law. Subject to Canon 6 of the Rules of Professional Conduct, any lawyer, alone or in association with any other lawyer, shall have the right to practice in all fields of law, even though he or she is certified as a specialist in a particular field of law.

(2) No lawyer shall be required to be certified as a specialist in order to practice in the field of law covered by that specialty. Subject to Canon 6 of the North Carolina Rules of Professional Conduct, any lawyer, alone or in association with any other lawyer, shall have the right to practice in any field of law, or advertise his or her availability to practice in any field of law consistent with Canon 2 of the Rules of Professional Conduct, even though he or she is not certified as a specialist in that field.

(3) All requirements for and all benefits to be derived from certification as a specialist are individual and may not be fulfilled by nor attributed to the law firm of which the specialist may be a member.

(4) Participation in the program shall be on a completely voluntary basis.

(5) A lawyer may be certified as a specialist in no more than two fields of law.

(6) When a client is referred by another lawyer to a lawyer who is a recognized specialist under this plan on a matter within the specialist's field of law, such specialist shall not take advantage of the referral to enlarge the scope of his or her representation and, consonant with any requirements of the Rules of Professional Conduct, such specialist shall not enlarge the scope of representation of a referred client outside the area of the specialty field.

(7) Any lawyer certified as a specialist under this plan shall be entitled to advertise that he or she is a "Board Certified Specialist" in his or her specialty to the extent permitted by the Rules of Professional Conduct.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.1719 Specialty Committees**

(a) The board shall establish a separate specialty committee for each specialty in which specialists are to be certified. Each specialty committee shall be composed of seven members appointed by the board, one of whom shall be designated annually by the chairperson of the board as chairperson of the specialty committee. Members of each specialty committee shall be lawyers licensed and currently in good standing to practice law in this state who, in the judgment of the board, are competent in the field of law to be covered by the specialty. Members shall hold office for three years, except those members initially appointed who shall serve as hereinafter designated. Members shall be appointed by the board to staggered terms of office and the initial appointees shall serve as follows: two shall serve for one year after appointment; two shall serve for two years after appointment; and three shall serve for three years after appointment. Appointment by the board to a vacancy shall be for the remaining term of the member leaving the specialty committee. All members shall be eligible for reappointment to not more than one additional three-year term after having served one full three-year term. Meetings of the specialty committee shall be held at regular intervals at such times, places and upon such notices as the specialty committee may from time to time prescribe or upon direction of the board.

(b) Each specialty committee shall advise and assist the board in carrying out the board's objectives and in the implementation and regulation of this plan in that specialty. Each specialty committee shall advise and make recommendations to the board as to standards for the specialty and the certification of individual specialists in that specialty. Each specialty

committee shall be charged with actively administering the plan in its specialty and with respect to that specialty shall

(1) after public hearing on due notice, recommend to the board reasonable and nondiscriminatory standards applicable to that specialty;

(2) make recommendations to the board for certification, continued certification, denial, suspension, or revocation of certification of specialists and for procedures with respect thereto;

(3) administer procedures established by the board for applications for certification and continued certification as a specialist and for denial, suspension, or revocation of such certification;

(4) administer examinations and other testing procedures, if applicable, investigate references of applicants and, if deemed advisable, seek additional information regarding applicants for certification or continued certification as specialists;

(5) make recommendations to the board concerning the approval of and credit to be allowed for continuing legal education courses, or educational alternatives, in the specialty;

(6) perform such other duties and make such other recommendations as may be delegated to or requested of the specialty committee by the board.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.1720 Minimum Standards for Certification of Specialists**

(a) To qualify for certification as a specialist, a lawyer applicant must pay any required fee, comply with the following minimum standards, and meet any other standards established by the board for the particular area of specialty.

(1) The applicant must be licensed and currently in good standing to practice law in this state.

(2) The applicant must make a satisfactory showing, as determined by the board after advice from the appropriate specialty committee, of substantial involvement in the specialty during the five years immediately preceding his or her application according to objective and verifiable standards. Such substantial involvement shall be defined as to each specialty from a consideration of its nature, complexity, and differences from other fields and from consideration of the kind and extent of effort and experience necessary to demonstrate competence in that specialty. It is a measurement of actual experience within the particular specialty according to any of several standards. It may be measured by the time spent on legal work within the areas of the specialty, the number or type of matters handled within a certain period of time or any combination of these or other appropriate factors. However, within each specialty, experience requirements should be measured by objective standards. In no event should they be either so restrictive as to unduly limit certification of lawyers as specialists or so lax as to make the requirement of substantial involvement meaningless as a criterion of competence. Substantial involvement may vary from specialty to specialty, but, if measured on a time-spent basis, in no event shall the time spent in practice in the specialty be less than 25 percent of the total practice of a lawyer engaged in a normal full-time practice. Reasonable and uniform practice equivalents may be established including, but not limited to, successful pursuit of an advance educational degree, teaching, judicial, government, or corporate legal experience.

(3) The applicant must make a satisfactory showing, as determined by the board after advice from the appropriate specialty committee, of continuing legal education in the specialty accredited by the board for the specialty, the minimum being an average of 12 hours of credit for continuing legal education, or its equivalent, for each of the three years immediately preceding application. Upon establishment of a new specialty, this standard may be satisfied in such manner as the board, upon advice from the appropriate specialty committee, may prescribe or may be waived if, and to the extent, accreditable continu-

ing legal education courses have not been available during the three years immediately preceding establishment of the specialty.

(4) The applicant must make a satisfactory showing, as determined by the board after advice from the appropriate specialty committee, of qualification in the specialty through peer review by providing, as references, the names of at least five lawyers, all of whom are licensed and currently in good standing to practice law in this state, or in any state, or judges, who are familiar with the competence and qualification of the applicant as a specialist. None of the references may be persons related to the applicant or, at the time of application, a partner of or otherwise associated with the applicant in the practice of law. The applicant by his or her application consents to confidential inquiry by the board or appropriate disciplinary body and other persons regarding the applicant's competence and qualifications to be certified as a specialist.

(5) The applicant must achieve a satisfactory score on a written examination designed to test the applicant's knowledge and ability in the specialty for which certification is applied. The examination must be applied uniformly to all applicants within each specialty area. The board shall assure that the contents and grading of the examination are designed to produce a uniform level of competence among the various specialties.

(b) All matters concerning the qualification of an applicant for certification, including, but not limited to, applications, references, tests and test scores, files, reports, investigations, hearings, findings, recommendations, and adverse determinations shall be confidential so far as is consistent with the effective administration of this plan, fairness to the applicant and due process of law.

(c) The board may adopt uniform rules waiving the requirements of Rules .1720(a)(4) and (5) above for members of a specialty committee at the time the initial written examination for that specialty is given and permitting said members to file applications to become a board certified specialist in that specialty upon compliance with all other required minimum standards for certification of specialists.

(d) Upon written request of the applicant and with the recommendation of the appropriate specialty committee, the board may for good cause shown waive strict compliance with the criteria relating to substantial involvement, continuing legal education, or peer review, as those requirements are set forth in the standards for certification for specialization. However, there shall be no waiver of the requirements that the applicant pass a written examination and be licensed to practice law in North Carolina for five years preceding the application.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.1721 Minimum Standards for Continued Certification of Specialists**

(a) The period of certification as a specialist shall be five years. During such period the board or appropriate specialty committee may require evidence from the specialist of his or her continued qualification for certification as a specialist, and the specialist must consent to inquiry by the board, or appropriate specialty committee of lawyers and judges, the appropriate disciplinary body, or others in the community regarding the specialist's continued competence and qualification to be certified as a specialist. Application for and approval of continued certification as a specialist shall be required prior to the end of each five-year period. To qualify for continued certification as a specialist, a lawyer applicant must pay any required fee, must demonstrate to the board with respect to the specialty both continued knowledge of the law of this state and continued competence and must comply with the following minimum standards.

(1) The specialist must make a satisfactory showing, as determined by the board after advice from the appropriate specialty committee, of substantial involvement (which shall be determined in accordance

with the principles set forth in Rule .1720(a)(2) of this subchapter) in the specialty during the entire period of certification as a specialist.

(2) The specialist must make a satisfactory showing, as determined by the board after advice from the appropriate specialty committee, of continuing legal education accredited by the board for the specialty during the period of certification as a specialist, the minimum being an average of 12 hours of credit for continuing legal education, or its equivalent, for each year during the entire period of certification as a specialist.

(3) The specialist must comply with the requirements set forth in Rules .1720(a)(1) and (4) of this subchapter.

(b) Upon written request of the applicant and with the recommendation of the appropriate specialty committee, the board may for good cause shown waive strict compliance with the criteria relating to substantial involvement, continuing legal education, or peer review, as those requirements are set forth in the standards for continued certification.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.1722 Establishment of Additional Standards**

The board may establish, on its own initiative or upon the specialty committee's recommendation, additional or more stringent standards for certification than those provided in Rules .1720 and .1721 of this subchapter. Additional standards or requirements established under this rule need not be the same for initial certification and continued certification as a specialist. It is the intent of the plan that all requirements for certification or recertification in any area of specialty shall be no more or less stringent than the requirements in any other area of specialty.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.1723 Suspension or Revocation of Certification as a Specialist**

(a) The board may revoke its certification of a lawyer as a specialist in the specialization program if the specialty is terminated or may suspend or revoke such certification if it is determined, upon the board's own initiative or upon recommendation of the appropriate specialty committee and after hearing before the board on appropriate notice, that

(1) the certification of the lawyer as a specialist was made contrary to the rules and regulations of the board;

(2) the lawyer certified as a specialist made a false representation, omission or misstatement of material fact to the board or appropriate specialty committee;

(3) the lawyer certified as a specialist has failed to abide by all rules and regulations promulgated by the board;

(4) the lawyer certified as a specialist has failed to pay the fees required;

(5) the lawyer certified as a specialist no longer meets the standards established by the board for the certification of specialists; or

(6) the lawyer certified as a specialist has been disciplined, disbarred, or suspended from practice by the Supreme Court of any other state or federal court or agency.

(b) The lawyer certified as a specialist has a duty to inform the board promptly of any fact or circumstance described in Rules .1723(a)(1) through (6) above.

(c) If the board revokes its certification of a lawyer as a specialist, the lawyer cannot again be certified as a specialist unless he or she so qualifies upon application made as if for initial certification as a specialist and upon such other conditions as the board may prescribe. If the board suspends certification of a lawyer as a specialist, such certification cannot be reinstated except upon the lawyer's application therefor and compliance with such conditions and requirements as the board may prescribe.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.1724 Right to Hearing and Appeal to Council**

A lawyer who is denied certification or continued certification as a specialist or whose certification is suspended or revoked shall have the right to a hearing before the board and, thereafter, the right to appeal the ruling made thereon by the board to the council under such rules and regulations as the board and council may prescribe. (See Section .1800 of this subchapter.)

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.1725 Areas of Specialty**

There are hereby recognized the following specialties:

(1) bankruptcy law

(a) consumer bankruptcy law

(b) business bankruptcy law

(2) estate planning and probate law

(3) real property law

(a) real property - residential

(b) real property - business, commercial, and industrial

(4) family law

(5) criminal law

(a) criminal appellate practice

(b) state criminal law

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.1726 Certification Standards of the Specialties of Bankruptcy Law, Estate Planning and Probate Law, Real Property Law, Family Law, and Criminal Law**

Previous decisions approving the certification standards for the areas of specialty listed above are hereby reaffirmed.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

## **Section .1800 Hearing and Appeal Rules of the Board of Legal Specialization**

### **.1801 Reconsideration of Applications, Failure of Written Examinations and Appeals**

(a) Applications Incomplete and/or Applicants Not in Compliance with Standards for Certification

(1) Incomplete Applications - The executive director of the North Carolina State Bar Board of Legal Specialization (the board) will review every application to determine if the application is complete. The applicant will be notified of the incompleteness of his or her application. The applicant must submit the completed application within 21 days of the date of mailing of the notice. If the applicant fails to provide the required information for the application during the requisite time period, the executive director will refer the application to the specialty committee for review.

(2) Applicant Not in Compliance - The executive director shall refer to the specialty committee for review any application which appears complete on its face but which does not satisfactorily demonstrate compliance with the standards for certification in the specialty area for which certification is sought.

(3) Specialty Committee Action - The specialty committee shall review the incomplete applications and the applications not in compliance with the standards for certification. After reviewing the applications, the specialty committee shall recommend to the board the acceptance or rejection of the applications. The specialty committee shall notify the board of its recommendations in writing and the reason for any negative recommendation must be specified. The specialty committee must complete the above process within 14 days of receiving the applications.

(4) Notification to Applicant of the Specialty Committee's Action - The executive director shall promptly notify the applicant in writing of the specialty committee's recommendation of rejection of the application. The notification must specify the reason for the recommendation of rejection of the application. In addition, the notification shall inform the applicant of his or her right to petition the board for review of the application or request a hearing before the board.

(5) Petition for Review by the Board - Within 21 days of the mailing of the notice from the executive director that an application has been recommended for rejection by the specialty committee, the applicant may petition the board for review. The petition may be informal (e.g., by letter), but should include the date on which notice of the recommendation of rejection was received and the reasons for which the applicant believes the specialty committee's recommendation of rejection should not be accepted.

(6) Review of Petition by the Board - A three-member panel of the board, to be appointed by the chairperson of the board, shall review and take action by a majority of the panel upon the petition and notify the applicant of the board's decision. The notification shall inform the applicant of his or her right to appeal the decision to the North Carolina State Bar Council (the council) if the board's action is unfavorable to the applicant.

(7) Request for Hearing - In lieu of a petition for review, an applicant may request a hearing before the board. The applicant shall notify the board through its executive director in writing of such request for a hearing within 21 days of the mailing of the notice regarding the specialty committee's recommendation of rejection of the application. The applicant shall set forth the grounds for the hearing before the board. In such a request, the applicant shall list the names of prospective witnesses and identify documentation and other evidence to be introduced at the hearing before the board. The applicant shall be notified of the board's decision, and if the board's decision is unfavorable to the applicant, the applicant will be notified of his or her right to appeal the board's decision to the council.

#### (8) Hearing Procedures

(A) Notice - Time and Place of Hearing - The chairperson of the board shall fix the time and place of the hearing as soon as practicable after the applicant's request for hearing is received. The applicant shall be notified of the hearing date. Such notice shall be given to the applicant at least 10 days prior to the time fixed for the hearing.

(B) Quorum - A panel of three members of the board, as appointed by the chairperson, shall be necessary to conduct the hearing with the majority of those in attendance necessary to decide upon the matter.

(C) Representation by Counsel and Witnesses - The applicant may be represented by counsel or represent himself or herself at such hearing. The applicant may offer witnesses and documents and may cross-examine any witness.

(D) Written Briefs - The applicant is urged to submit a written brief (in quadruplicate) 10 days prior to the hearing to the executive director for distribution to the panel in support of his or her position. However, written briefs are not required.

(E) Depositions - Should the applicant or executive director desire to take a deposition prior to the board hearing of any voluntary witness who cannot attend the board hearing, such intention to take, and request to take, the deposition of a witness may be applied for in writing to the chairperson of the board together with a written consent signed by the potential witness that he or she will give a deposition for one party and a statement to the effect that the witness cannot attend the hearing along with the reason for such unavailability. The party seeking to take the deposition of a witness shall state in detail as to what the witness is expected to

testify. If the chairperson is satisfied that such deposition from a possible witness will be relevant to the issue in question before the board, then the chairperson will authorize said taking of the deposition. The chairperson will also designate the executive director or a member of the specialty committee to be present at the deposition. The deposition may be taken orally or by video. Any refusal of the taking of the deposition by the chairperson shall be reviewed by the board at the request of the applicant. The cost connected with taking the deposition shall be borne by the party requesting the deposition.

(F) Continuances - Motions for continuance of the hearing should be made to the chairperson of the board and such motions will be granted or denied by the chairperson of the board.

(G) Burden of Proof - Preponderance of the Evidence - The panel of the board shall apply the preponderance of the evidence rule in determining whether or not to accept the application for certification. The burden of proof is upon the applicant.

#### (H) Conduct of Hearings: Rights of Parties -

(i) Hearings shall be reported by a certified court reporter.

The applicant shall pay the costs associated with obtaining the court reporter's services for the hearing. The applicant shall pay the costs of the transcript and shall arrange for the preparation of the transcript with the court reporter. The applicant shall be taxed with all other costs of the hearing, but such costs shall not include any compensation to the members of the board before whom the hearing is conducted. The board in its discretion may refund to the applicant all or some portion of the necessary costs incurred as a result of the hearing.

(ii) The applicant may retain counsel at all stages of the investigation and at all meetings. The applicant and his or her counsel shall have the right to attend all hearings.

(iii) Oral evidence at hearings shall be taken only on oath or affirmation. The applicant shall have the right to testify unless he or she specifically waives such right or fails to appear at the hearing. If the applicant does not testify on his or her behalf, the applicant may be called and examined by the panel of the board, the executive director, and any member of the specialty committee. The applicant's failure to appear at the hearing ordered by the board, after receipt of written notice, shall constitute a waiver of the applicant's right to a hearing before the board.

(iv) At any hearing, the panel of the board, the executive director, any member of the appropriate specialty committee, and the applicant shall have these rights:

(a) to call and examine witnesses;

(b) to offer exhibits;

(c) to cross-examine witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination; and

(d) to impeach any witness regardless of who first called such witness to testify and to rebut any evidence.

(v) Hearings need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions.

(vi) Any hearing may be recessed or adjourned from time to time at the discretion of the panel.

(9) Failure of Applicant to Petition the Board for Review or Request a Hearing Before the Board Within the Time Allowed by These Rules - If the applicant does not petition the board for review or

quest a hearing before the board regarding the specialty committee's recommendation of rejection of the application within the time allowed by these rules, the board shall act on the matter at its next board meeting.

**(b) Failure of Written Examination**

(1) Review of Examination - Within 30 days of the mailing of the notice from the board's executive director that the applicant has failed the written examination, the applicant may review his or her examination at the office of the board at a time designated by the executive director. The applicant shall not remove the examination from the board's office, but may upon request be furnished a copy of all questions and answers upon which he or she did not receive full credit on the examination. The costs of the reproduction of the examination shall be borne by the applicant.

(2) Petition for Grade Review - If, after reviewing the examination, the applicant feels an error or errors were made in the grading, he or she may file with the executive director a petition for grade review. The petition must be filed within 45 days of the mailing of the notice of failure and should set out in detail the area or areas which, in the opinion of the applicant, have been incorrectly graded. Supporting information may be filed to substantiate the applicant's claim. At the time of filing the petition, the applicant must either (A) request a hearing before a three-member panel of the board; or (B) waive his or her right to a hearing before the board and request that the board render a decision based upon its review of the applicant's examination, supporting documents, and the recommendations of the review committee of the specialty committee.

(3) Review Procedure - The applicant's examination and petition shall be submitted to a panel consisting of a minimum of at least three members of the specialty committee (the review committee of the specialty committee). All information will be submitted in blind form, the staff being responsible for deleting any identifying information on the examination or the petition. The review committee of the specialty committee shall review the entire examination of the applicant. The review committee of the specialty committee shall recommend to the board that the grade of the examination remain the same or be changed.

(4) Decision of the Board - A panel of the board shall consider the applicant's petition for grade review either by hearing or by a review only of the applicant's submitted materials.

(5) Hearing Procedures - The rules set forth in Rule .1801(a)(8) above shall be followed when an applicant petitions for a hearing before the board for a grade review of his or her examination.

(6) Burden of Proof: Preponderance of the Evidence - The panel of the board shall apply the preponderance of the evidence rule in determining whether the applicant's grade on the examination should remain the same or be changed. The burden of proof is upon the applicant.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**.1802 Denial of Continued Certification as a Specialist**

(a) Denial of Continued Certification - The board, upon its initiative or upon recommendation of the appropriate specialty committee, may deny continued certification of a specialist, if the applicant does not meet the requirements as found in Rule .1721(a) of this subchapter.

(b) Notification of Board Action - The executive director shall notify the applicant of the board's decision to grant or deny continued certification as a specialist.

(c) Request for Hearing - Within 21 days of the mailing of notice from the executive director of the board that the applicant has been denied continued certification, the applicant may request a hearing before the board.

(d) Hearing Procedure - The rules set forth in Rule .1801(a)(8) of this subchapter shall be followed when an applicant requests a hearing regarding the denial of continued certification.

(e) Burden of Proof: Preponderance of the Evidence - A three-member panel of the board shall apply the preponderance of the evidence rule in determining whether the applicant's certification should be continued. The burden of proof is upon the applicant.

(f) Notification of Board's Decision - The board shall notify the applicant of its decision to grant or deny continued certification as a specialist.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**.1803 Suspension or Revocation of a Specialist's Certification**

(a) The board may suspend or revoke its certification of a lawyer as a specialist upon the board's initiative or upon recommendation of the appropriate specialty committee and after hearing before the board on appropriate notice, upon a finding that:

(1) the lawyer was certified as a specialist contrary to the rules and regulations of the board;

(2) the lawyer certified as a specialist made a false representation, omission or misstatement of material fact to the board or appropriate specialty committee;

(3) the lawyer certified as a specialist has failed to abide by all rules and regulations promulgated by the board;

(4) the lawyer certified as a specialist has failed to pay the fees required;

(5) the lawyer certified as a specialist no longer meets the standards established by the board for the certification of specialists; or

(6) the lawyer certified as a specialist has been disciplined, disbarred or suspended from practice in North Carolina or by the supreme court of any other state or federal court or agency.

(b) The executive director shall notify the specialist in writing of the board's consideration of the suspension or revocation of the specialist's certification. The specialist will also be notified of his or her right to a hearing on the issue. The specialist must request in writing a hearing within 21 days of the mailing of the notice of suspension or revocation of certification.

(c) At its next regular or specially called meeting, the board shall conduct a hearing according to the hearing procedures set forth in Rule .1801(a)(8) of this subchapter. The board shall apply the preponderance of the evidence rule in determining whether the specialist's certification should be suspended or revoked. The burden of proof is upon the board.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**.1804 Appeal to the Council**

(a) Appealable Decisions - An appeal may be taken to the council from a decision of the board which denies an applicant certification (i.e., when an applicant's application has been rejected because it is incomplete and/or not in compliance with the standards for certification or when an applicant fails the written specialty examination), denies an applicant continued certification as a specialist, or suspends or revokes a specialist's certification. (Persons who appeal the board's decision are referred to herein as appellants.)

(b) Filing the Appeal - An appeal from a decision of the board as described in Rule .1804(a) above may be taken by filing with the executive director of the North Carolina State Bar (the State Bar) a written notice of appeal not later than 21 days after the mailing of the board's decision to the applicant who is denied certification or continued certification or to a lawyer whose certification is suspended or revoked.

(c) Time and Place of Hearing - The appeal will be scheduled for hearing at a time set by the council. The executive director of the State Bar shall notify the appellant and the board of the time and place of the hearing before the council.

(d) Record on Appeal to the Council

(1) The record on appeal to the council shall consist of all the evidence offered at the hearing before the board. The executive director of the board shall assemble the record and certify it to the executive director of the State Bar and notify the appellant of such action.

(2) The appellant shall make prompt arrangement with the court reporter to obtain and have filed with the executive director of the State Bar a complete transcript of the hearing. Failure of the appellant to make such arrangements and pay the costs shall be grounds for dismissal of the appeal.

(e) Parties Appearing Before the Council - The appellant may request to appear, with or without counsel, before the council and make oral argument. The board may appear on its own behalf or by counsel.

(f) Appeal Procedure - The council shall consider the appeal *en banc*. The council shall consider only the record on appeal, briefs, and oral arguments. The decision of the council shall be by a majority of those members voting. All council members present at the meeting may participate in the discussion and deliberation of the appeal. Members of the board who also serve on the council are recused from voting on the appeal.

(g) Notice of the Council's decision - The appellant shall receive written notice of the council's decision.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.1805 Judicial Review**

(a) Appeals - The appellant or the board may appeal from an adverse ruling by the council.

(b) Wake County Superior Court - All appeals from the council shall lie to the Wake County Superior Court. (See *N.C. State Bar v. Du Mont*, 304 N.C. 627, 286 S.E.2d 89 (1982).)

(c) Judicial Review Procedures - Article 4 of G.S. 150-B shall be complied with by all parties relative to the procedures for judicial review of the council's decision.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.1806 Additional Rules Pertaining to Hearings and Appeals**

(a) Notices - Every notice required by these rules shall be mailed to the applicant.

(b) Expenses Related to Hearings and Appeals - In its discretion, the board may direct that the necessary expenses incurred in any investigation, processing, and hearing of any matter to the board or appeal to the council be paid by the board. However, all expenses related to travel to any hearing or appeal for the applicant, his or her attorney, and witnesses called by the applicant shall be borne by the applicant and shall not be paid by the board.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

## **Section .1900 Rules Concerning the Accreditation of Continuing Legal Education for the Purposes of the Board of Legal Specialization**

### **.1901 General Provisions**

(a) An applicant for certification in a specialty field must make a satisfactory showing of the requisite number of hours of continuing legal education (CLE) in the specialty field for each of the last three years prior to application in accord with the standards adopted by the board in the field. In no event will the number of hours be less than an average of twelve hours per year. The average number of hours is computed by adding all hours of continuing legal education credits in the field for three years and dividing by three.

(b) An applicant for continued certification must make a satisfactory showing of the requisite number of hours of continuing legal education (CLE) in the specialty field for each of the five years of certification in

accord with the standards adopted by the board in the field. In no event will the number of hours be less than an average of twelve hours per year. The average number of hours is computed by adding all hours of continuing legal education credits in the field for the five years and dividing by five.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.1902 Definitions**

(1) Applicant - The person applying for certification or continued certification of specialization.

(2) Board - The North Carolina State Bar Board of Legal Specialization.

(3) Committee - The specialty committee appointed by the board in the applicant's specialty field.

(4) Sponsor - An organization offering continuing legal education courses for attendance by attorneys.

(5) Accredited Sponsor - A sponsor which has demonstrated to the satisfaction of the board that the continuing legal education programs offered by it meet the accreditation standards on a continuing basis warranting a presumption of accreditation.

(6) Accreditation - A determination by the board that the continuing legal education activities further the professional competence of the applicant and a certain number of hours of continuing legal education credit should be awarded for participation in the continuing legal education activity.

(7) Continuing Legal Education (CLE) - Attendance at lecture-type instruction meeting the standards in Rule .1903 of this subchapter or participation in alternative activities described in Rule .1905 of this subchapter.

(8) Specialty Field - An area of the law as defined by the board in which the board certifies specialists.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.1903 Accreditation Standards for Lecture-Type CLE Activities**

(a) The CLE activity shall have significant intellectual or practical content and the primary objective shall be to increase the participant's professional competence in the applicant's specialty field.

(b) The CLE activity shall constitute an organized program of learning dealing with matters directly related to the practice of law, professional responsibility, or ethical obligations of lawyers in the applicant's specialty field.

(c) The CLE activity may be presented by either live instruction or mechanical or electronically recorded or reproduced material. If electronic transmission is used, an instructor should be present for comment or to answer questions. The board may reduce the hours of credit for electronic transmission when no instructor is present.

(d) Continuing legal education materials are to be prepared and activities conducted by an individual or group qualified by practical or academic experience in a setting suitable to the educational activity of the program.

(e) Except when not suitable or readily available because of the topic or the nature of the lecture, thorough, high quality, and carefully prepared written materials shall be provided to all attendees prior to or at the time the instruction is presented. Absence of materials should be the exception and not the rule.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.1904 Computation of Hours of Instruction**

(a) Hours of CLE will be computed by adding the number of minutes of actual instruction, dividing by 60 and rounding the results to the nearest one-tenth of an hour.

(b) Only actual instruction will be included in computing the total hours of actual instruction. The following will be excluded:

- (1) introductory remarks;
- (2) breaks;
- (3) business meetings;
- (4) keynote speeches or speeches in connection with meals;
- (5) question and answer sessions in excess of fifteen minutes per hour of instruction;
- (6) programs of less than 60 minutes in length.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.1905 Alternatives to Lecture-Type CLE Course Instruction**

(a) Teaching - Preparation and presentation of written materials at an accredited CLE course will qualify for CLE credit at the rate of three hours of credit for each hour of presentation as computed under Rule .1904 of this subchapter. In the case of joint preparation and/or presentation, each preparer and presenter will receive a proportionate share of the total credit available. Repeat presentations of substantially the same materials will not qualify for additional credit. Instruction at an academic institution will qualify for three hours of CLE credit per semester hour taught in the specialty field.

(b) Publication - Publication of a scholarly article in the applicant's specialty field will qualify for CLE credit in the discretion of the specialty committee, subject to board approval, based on a review of the article, its content, and its quality. No more than ten hours of credit will be given for a single article.

(c) Self-study - An individual may review video or audio tapes or manuscripts of lectures from qualified CLE courses, which lectures would meet the accreditation standards in Rule .1903 of this subchapter and receive credit according to the computation of hours in Rule .1904 of this subchapter provided that no more than two hours per year of self-study shall qualify to meet the CLE requirements for certification or recertification.

(d) Advanced degrees - Attendance at courses of instruction at a law school which can be credited toward the earning of an advanced degree in the specialty field of the applicant will qualify for one hour of CLE credit per semester hour taken if attained in the required period prior to application for certification or recertification.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.1906 Accreditation of Courses**

(a) All courses offered by an accredited sponsor which relate to the specialty field as defined by the board shall be accredited and credit for attendance shall be given for the hours of instruction related to the specialty field of the applicant as determined by the board.

(b) The applicant shall make a showing that any course for which the applicant desires CLE credit offered by a sponsor not on the accredited sponsor list meets the accreditation standards of Rule .1903 of this subchapter. The board will then determine the number of hours of credit based upon the standards of Rule .1904 of this subchapter.

(c) An accredited sponsor may not represent or advertise that a CLE course is approved or that the attendees will be given CLE credit by the board unless such sponsor provides a brochure or other appropriate information describing the topics, hours of instruction, and instructors for its CLE offerings in a specialty field at least thirty days in advance of the date of the course and pay a fee of \$100 per course for the costs of accreditation.

(d) An unaccredited sponsor desiring advance accreditation of a course and the right to designate its accreditation for the appropriate number of CLE credits in its solicitations shall submit a brochure or other appropriate information describing the topics, hours of instruction, location, and instructors for its CLE offerings at least sixty days prior to the date of the

course. A fee of \$200 shall accompany all requests for accreditation of courses from a sponsor not on the accredited sponsor list.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.1907 Accreditation of Sponsor**

(a) The following is the list of accredited sponsors:

- (1) North Carolina Bar Foundation
- (2) North Carolina Academy of Trial Lawyers
- (3) Wake Forest University Continuing Legal Education
- (4) University of North Carolina at Chapel Hill Continuing Legal Education
- (5) Duke University School of Law Continuing Legal Education
- (6) Norman Adrian Wiggins School of Law Continuing Legal Education
- (7) Middle District Bankruptcy Seminar
- (8) UCB Estate Planning and Taxation Seminar
- (9) any member of the Association of Continuing Legal Education Administrators
- (10) University of Miami School of Law
- (11) any of the following groups: American Bar Association, American College of Probate Counsel, American College of Trial Counsel, American Patent Law Association, Association of American Law Schools, Association of Life Insurance Counsel, Conference of Chief Justices, Council on Legal Education for Professional Responsibility, Inc., Federal Bar Association, Federal Communications Bar Association, Judge Advocates Association, Maritime Law Association of the United States, National Association of Attorneys General, National Association of Bar Executives, National Association of Bar Presidents, National Association of Bar Counsel, National Association of Women Lawyers, National Bar Association, National Conference of Bar Examiners, National Conference of Commissioners on Uniform State Laws, National Conference of Judicial Councils, National District Attorneys Association, and National Legal Aid and Defender Association.

(b) Any sponsor not listed in Rule .1907(a) above desiring to attain accredited sponsor status must submit to the board a description of the courses offered for the two years prior to application to the board for accredited sponsor status. The board may request copies of any course materials used in any of the offered courses. If, in the judgment of the board, the sponsor has met the accreditation standards of Rule .1903 of this subchapter for each of the courses offered, the board will designate the sponsor as an accredited sponsor.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.1908 Showing by Applicants**

Every applicant will list each type of CLE activity under each of the following categories:

- (1) attendance at CLE instruction offered by an accredited sponsor. The course name, sponsor, and number of hours of CLE shall be listed by the applicant;
- (2) attendance at CLE instruction offered by a sponsor not on the accredited sponsor list or not given advanced approval by the board under Rule .1906 of this subchapter. A fee of \$5.00 per course will be charged for accrediting each course listed by the applicant offered by a sponsor not on the accredited sponsor list or not given advanced approval under Rule .1906(d) of this subchapter. The course name, sponsor, and number of hours of CLE shall be listed by the applicant;
- (3) participation as an instructor at a CLE course. The course name, sponsor, and number of hours of instruction or preparation shall be stated by the applicant;
- (4) publication of a scholarly article. A copy of the publication shall accompany the application;

(5) self-study. A description of the materials used, the dates of use, the number of hours claimed, and the source from which they were obtained shall accompany the application.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

## **Section .2000 Rules of the Board of Legal Specialization for Approval of Independent Certifying Organizations**

### **.2001 Policy Statement**

These guidelines for reviewing independent organizations which certify lawyers as specialists are designed to thoroughly evaluate the purpose and function of such certifying organizations and the procedures they use in their certification processes. These guidelines are not meant to be exclusive, but to provide a framework in which certifying organizations can be evaluated. The aim of this evaluation is to provide consumers of legal services a means of access to lawyers who are qualified in particular fields of law.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.2002 General Procedure**

As contemplated in Rule 2.5 of the North Carolina Rules of Professional Conduct, the North Carolina State Bar, through its Board of Legal Specialization (the board), shall, upon the filing of a completed application and the payment of any required fee, review the standards and procedures of any organization which certifies lawyers as specialists and desires the approval of the North Carolina State Bar. The board shall prepare an application form to be used by certifying organizations and shall administer the application process.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.2003 Factors to be Considered in Reviewing Certifying Organizations**

(a) Purpose of the Organization - The stated purposes for the original formation of the organization and any subsequent changes in those purposes shall be examined to determine whether the organization is dedicated to the maintenance of professional competence.

(b) Background of the Organization - The length of time the organization has been in existence, whether the organization is a successor of another, the requirements for membership in the organization, the number of members which the organization has, the business structure under which the organization operates, and the professional qualifications of the individuals who direct the policies and operations of the organization shall be examined to determine whether the organization is a bona fide certifying organization.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.2004 Standards for Approval of Certifying Organizations**

The following standards are to be considered by the board in evaluating an application for approval of a certifying organization.

(1) Uniform Applicability of Certification Standards - In general, the standards for certification in any specialty field must be understandable and easily applied to individual applicants. Certification by the organization must be available to any attorney who meets the standards, and the organization must not certify an attorney who has not demonstrably met each standard. The organization must agree to promptly inform the board of any material changes in its standards, definitions of specialty fields or certifying procedures and must further agree to respond promptly to any reasonable requests for information from the board.

(2) Definitions of Specialty Fields - Every field of law in which certification is offered must be susceptible of meaningful definition and be an area in which North Carolina lawyers regularly practice.

(3) Decision Making by Recognized Experts - The persons in a certifying organization making decisions regarding applicants shall include lawyers who, in the judgment of the board, are experts in the subject areas of practice and who each have extensive practice or involvement in those areas of practice.

(4) Certification Standards - A certifying organization's standards for certification of specialists must include, as a minimum, the standards required for certification set out in the North Carolina Plan of Legal Specialization (Section .1700 of this subchapter) and in the rules, regulations and standards adopted by the board from time to time. Such standards shall not unlawfully discriminate against any lawyer properly qualified for certification as a specialist, but shall provide a reasonable basis for a determination that an applicant possesses special competence in a particular field of law, as demonstrated by the following means:

(a) Substantial Involvement - Substantial involvement in the area of specialty during the five-year period immediately preceding application to the certifying agency. Substantial involvement is generally measured by the amount of time spent practicing in the area of specialty. In no event may the time spent in practicing the specialty be less than 25 percent of the total practice of a lawyer engaged in a normal full-time practice;

(b) Peer Review - Peer recommendations from attorneys or judges who are familiar with the competence of the applicant in the area of specialty, none of whom are related to, engaged in legal practice with, or involved in continuing commercial relationships with the lawyer;

(c) Written Examination - Objective evaluation of the applicant's knowledge of the substantive and procedural law in the area of specialty as determined by written examination;

(d) Continuing Legal Education - At least 36 hours of approved continuing legal education credit in the area of specialty during the three years immediately preceding application to the certifying organization.

(5) Applications and Procedures - Application forms used by the certifying organization must be submitted to the board for review to determine that the requirements specified above are being met by applicants. Additionally, the certifying organization must submit a description of the process it uses to review applications.

(6) Requirements for Recertification - The standards used by a certifying organization must provide for certification for a limited period of time, which shall not exceed five years, after which time persons who have been certified must apply for recertification. Requirements for recertification must include continued substantial involvement in the area of specialty, continuing legal education, and appropriate peer review.

(7) Revocation of Certification - The standards used by a certifying organization shall include a procedure for revocation of certification. A certification shall be revoked upon a finding that the certificate holder has been disbarred or suspended from the practice of law. The standards shall require a certificate holder to report his or her disbarment or suspension from the practice of law to the certifying organization.

(8) Waiver - The standards used by a certifying organization may provide for waiver of the peer review and written examination requirements set forth in Rules .2004(4)(b) and (c) above for an applicant who was responsible for formulating and grading the organization's initial written examination in his or her area of specialty.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.2005 Application Procedure**

(a) The organization may file an application seeking approval of the organization by the board. Applications shall be on forms available from and approved by the board. The application fee shall be \$1,000.

(b) The organization which has been approved shall provide its standards, definitions and/or certifying procedures to the board in January of each year and must pay an annual administrative fee of \$100 to maintain its approved status.

(c) When the board determines that an approved certifying organization has ceased to exist, has ceased to operate its certification program in the manner described in its application, or has failed to comply with the requirements of Rule .2005(b) above, its approved status shall be revoked. After such a revocation, no North Carolina lawyer may publicize a certification from the organization in question.

(d) The appeal procedures of the board shall apply to any application by an organization for approval as a certifying organization and any decision to revoke a certifying organization's approved status.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

## **.2006 Effect of Approval of a Certifying Organization by the Board of Legal Specialization**

When an organization is approved as a certifying organization by the board, any North Carolina lawyer certified as a specialist by that organization may publicize that certification.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

## **Section .2100 Certification Standards for the Real Property Law Specialty**

### **.2101 Establishment of Specialty Field**

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates real property law, including the subspecialties of real property-residential transactions and real property-business, commercial, and industrial transactions as a field of law for which certification of specialists under the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) is permitted.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.2102 Definition of Specialty**

The specialty of real property law is the practice of law dealing with real property transactions, including title examination, property transfers, financing, leases, and determination of property rights. Subspecialties in the field are identified and defined as follows:

(a) Real Property Law-Residential Transactions - The practice of law dealing with the acquisition, ownership, leasing, financing, use, transfer and disposition, of residential real property by individuals;

(b) Real Property Law-Business, Commercial, and Industrial Transactions - The practice of law dealing with the acquisition, ownership, leasing, management, financing, development, use, transfer, and disposition of residential, business, commercial, and industrial real property.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.2103 Recognition as a Specialist in Real Property Law**

A lawyer may qualify as a specialist by meeting the standards set for one or both of the subspecialties. If a lawyer qualifies as a specialist in real property law by meeting the standards set for the real property law-residential transactions subspecialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Real Property Law-Residential Transactions." If a lawyer qualifies as a specialist in real property law by meeting the standards set for the real property law-business, commercial, and industrial transactions, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Real Property Law-Business, Commercial, and Industrial Transactions." If a lawyer qualifies as a specialist in real property law by meeting the standards set for both the real property law-residential transactions subspecialty

and the real property law-business, commercial, and industrial transactions subspecialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Real Property Law-Residential, Business, Commercial and Industrial Transactions."

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

## **.2104 Applicability of Provisions of the North Carolina Plan of Legal Specialization**

Certification and continued certification of specialists in real property law shall be governed by the provisions of the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) as supplemented by these standards for certification.

## **.2105 Standards for Certification as a Specialist in Real Property Law**

Each applicant for certification as a specialist in real property law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification in real property law:

(a) Licensure and Practice - An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

(b) Substantial Involvement - An applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of real property law.

(1) Substantial involvement shall mean during the five years preceding the application, the applicant has devoted an average of at least 500 hours a year to the practice of real property law, but not less than 400 hours in any one year.

(2) Practice shall mean substantive legal work done primarily for the purpose of legal advice or representation, or a practice equivalent.

(3) Practice equivalent means service as a law professor concentrating in the teaching of real property law. Teaching may be substituted for one year of experience to meet the five-year requirement.

(c) Continuing Legal Education - An applicant must have earned no less than 36 hours of accredited continuing legal education (CLE) credits in real property law during the three years preceding application with not less than 6 credits in any one year.

(d) Peer Review - An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice in North Carolina. An applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(2) The references shall be given on standardized forms provided by the board with the application for certification in the specialty field. These forms shall be returned directly to the specialty committee.

(e) Examination - The applicant must pass a written examination designed to test the applicant's knowledge and ability in real property law.

(1) Terms - The examination(s) shall be in written form and shall be given annually. The examination(s) shall be administered and graded uniformly by the specialty committee.

(2) Subject Matter - The examination shall cover the applicant's knowledge in the following topics in real property law or in the subspecialty or subspecialties that the applicant has elected:

(A) title examinations, property transfers, financing, leases, and determination of property rights;

(B) the acquisition, ownership, leasing, financing, use, transfer, and disposition of residential real property by individuals;

(C) the acquisition, ownership, leasing, management, financing, development, use, transfer, and disposition of residential, business, commercial, and industrial real property.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### **.2106 Standards for Continued Certification as a Specialist**

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2106(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - The specialist must demonstrate that, for each of the five years preceding application, he or she has had substantial involvement in the specialty as defined in Rule .2105(b) of this subchapter.

(b) Continuing Legal Education - The specialist must have earned no less than 60 hours of accredited continuing legal education credits in real property law as accredited by the board with not less than 6 credits earned in any one year.

(c) Peer Review - The specialist must comply with the requirements of Rule .2105(d) of this subchapter.

(d) Time for Application - Application for continued certification shall be made not more than one hundred eighty (180) days nor less than ninety days prior to the expiration of the prior period of certification.

(e) Lapse of Certification - Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Rule .2105 of this subchapter, including the examination.

(f) Suspension or Revocation of Certification - If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Rule .2105 of this subchapter.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### **.2107 Applicability of Other Requirements**

The specific standards set forth herein for certification of specialists in real property law are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **Section .2200 Certification Standards for the Bankruptcy Law Specialty**

#### **.2201 Establishment of Specialty Field**

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates bankruptcy law, including the subspecialties of consumer bankruptcy law and business bankruptcy law, as a field of law for which certification of specialists under the Plan of Legal Specialization (see Section .1700 of this subchapter) is permitted.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### **.2202 Definition of Specialty**

The specialty of bankruptcy law is the practice of law dealing with all laws and procedures involving the rights, obligations, and remedies between debtors and creditors in potential or pending federal bankruptcy cases and state insolvency actions. Subspecialties in the field are identified and defined as follows:

(a) Consumer Bankruptcy Law - The practice of law dealing with consumer bankruptcy and the representation of interested parties in contested matters or adversary proceedings in individual filings of Chapter 7, Chapter 12, or Chapter 13;

(b) Business Bankruptcy Law - The practice of law dealing with business bankruptcy and the representation of interested parties in contested matters or adversary proceedings in bankruptcy cases filed on behalf of debtors who are or have been engaged in business prior to an entity filing Chapter 7, Chapter 9, Chapter 11, or Chapter 12.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### **.2203 Recognition as a Specialist in Bankruptcy Law**

A lawyer may qualify as a specialist by meeting the standards set for one or both of the subspecialties. If a lawyer qualifies as a specialist in bankruptcy law by meeting the standards set for the consumer bankruptcy law subspecialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Consumer Bankruptcy Law." If a lawyer qualifies as a specialist in bankruptcy law by meeting the standards set for the business bankruptcy law subspecialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Business Bankruptcy Law." If a lawyer qualifies as a specialist in bankruptcy law by meeting the standards set for both the consumer bankruptcy law and the business bankruptcy law subspecialties, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Business and Consumer Bankruptcy Law."

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### **.2204 Applicability of Provisions of the North Carolina Plan of Legal Specialization**

Certification and continued certification of specialists in bankruptcy law shall be governed by the provisions of the Plan of Legal Specialization (see Section .1700 of this subchapter) as supplemented by these standards for certification.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### **.2205 Standards for Certification as a Specialist in Bankruptcy Law**

Each applicant for certification as a specialist in bankruptcy law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification as a specialist in bankruptcy law:

(a) Licensure and Practice - An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

(b) Substantial Involvement - An applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of bankruptcy law.

(1) Substantial involvement shall mean during the five years preceding the application, the applicant has devoted an average of at least 500 hours a year to the practice of bankruptcy law, but not less than 400 hours in any one year.

(2) Practice shall mean substantive legal work done primarily for the purpose of legal advice or representation, or a practice equivalent.

(3) Practice equivalent shall mean, after admission to the bar of any state, District of Columbia, or a U.S. territorial possession

(A) service as a judge of any bankruptcy court, service as a clerk of any bankruptcy court, or service as a standing trustee;

(B) corporate or government service, including military service, after admission to the bar of any state, the District of Columbia, or any U.S. territorial possession, but only if the bankruptcy work done was legal advice or representation of the corporation, governmental unit, or individuals connected therewith;

(C) service as a deputy or assistant clerk of any bankruptcy court, as a research assistant to a bankruptcy judge, or as a law professor teaching bankruptcy and/or debtor-creditor related courses may be substituted for one year of experience to meet the five-year requirement.

(c) Continuing Legal Education - An applicant must have earned no less than 36 hours of accredited continuing legal education (CLE) credits in bankruptcy law, during the three years preceding application with not less than 6 credits in any one year.

(d) Peer Review - An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice in North Carolina. An applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be a judge of any bankruptcy court.

(2) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(3) The references shall be given on standardized forms provided by the board with the application for certification in the specialty field. These forms shall be returned directly to the specialty committee.

(e) Examination - The applicant must pass a written examination designed to test the applicant's knowledge and ability in bankruptcy law.

(1) Terms - The examination shall be in written form and shall be given annually. The examination shall be administered and graded uniformly by the specialty committee.

(2) Subject Matter - The examination shall cover the applicant's knowledge and application of the law in the following topics in the subspecialty or subspecialties that the applicant has elected:

(A) all provisions of the Bankruptcy Reform Act of 1978, as amended, and legislative history related thereto, except subchapters III and IV of Chapter 7 and Chapter 9 of Title II, United States Code;

(B) the Rules of Bankruptcy Procedure effective as of August 1, 1983, as amended;

(C) bankruptcy crimes and immunity;

(D) state laws affecting debtor-creditor relations, including, but not limited to, state court insolvency proceedings; Chapter 1C of the North Carolina General Statutes; the creation, perfection, enforcement, and priorities of secured claims, claim and delivery; and attachment and garnishment;

(E) judicial interpretations of any of the above.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

## **.2206 Standards for Continued Certification as a Specialist**

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2206(d) below. No examination will be required for

continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - The specialist must demonstrate that, for each of the five years preceding application, he or she has had substantial involvement in the specialty as defined in Rule .2205(b) of this subchapter.

(b) Continuing Legal Education - Since last certified, a specialist must have earned no less than 60 hours of accredited continued legal education credits in bankruptcy law with not less than 6 credits earned in any one year.

(c) Peer Review - The specialist must comply with the requirements of Rule .2205(d) of this subchapter.

(d) Application for continued certification shall be made not more than 180 days nor less than 90 days prior to the expiration of the prior period of certification.

(e) Lapse of Certification - Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Rule .2205 of this subchapter, including the examination.

(f) Suspension or Revocation of Certification - If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Rule .2205 of this subchapter.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

## **.2207 Applicability of Other Requirements**

The specific standards set forth herein for certification of specialists in bankruptcy law are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

## **Section .2300 Certification Standards for the Estate Planning and Probate Law Specialty**

### **.2301 Establishment of Specialty Field**

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates estate planning and probate law as a field of law for which certification of specialists under the Plan of Legal Specialization (see Section .1700 of this subchapter) is permitted.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.2302 Definition of Specialty**

The specialty of estate planning and probate law is the practice of law dealing with planning for conservation and disposition of estates, including consideration of federal and state tax consequences; preparation of legal instruments to effectuate estate plans; and probate of wills and administration of estates, including federal and state tax matters.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.2303 Recognition as a Specialist in Estate Planning and Probate Law**

If a lawyer qualifies as a specialist in estate planning and probate law by meeting the standards set for the specialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Estate Planning and Probate Law."

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.2304 Applicability of Provisions of the North Carolina Plan of Legal Specialization**

Certification and continued certification of specialists in estate planning and probate law shall be governed by the provisions of the Plan of Legal Specialization (see Section .1700 of this subchapter) as supplemented by these standards for certification.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.2305 Standards for Certification as a Specialist in Estate Planning and Probate Law**

Each applicant for certification as a specialist in estate planning and probate law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification as a specialist in estate planning and probate law:

(a) **Licensure and Practice** - An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

(b) **Substantial Involvement** - The applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of estate planning and probate law.

(1) Substantial involvement shall be measured as follows:

(A) **Time Spent** - During the five years preceding the application, the applicant has devoted an average of at least 500 hours a year to the practice of estate planning and probate law, but not less than 400 hours in any one year;

(B) **Experience Gained** - During the five years immediately preceding application, the applicant shall have had continuing involvement in a substantial portion of the activities described in each of the following paragraphs:

(i) counseled persons in estate planning, including giving advice with respect to gifts, life insurance, wills, trusts, business arrangements and agreements, and other estate planning matters;

(ii) prepared or supervised the preparation of (1) estate planning instruments, such as simple and complex wills (including provisions for testamentary trusts, marital deductions and elections), revocable and irrevocable inter vivos trusts (including short-term and minor's trusts), business planning agreements (including buy-sell agreements and employment contracts), powers of attorney and other estate planning instruments; and (2) federal and state gift tax returns, including representation before the Internal Revenue Service and the North Carolina Department of Revenue in connection with gift tax returns;

(iii) handled or advised with respect to the probate of wills and the administration of decedents' estates, including representation of the personal representative before the clerk of superior court, guardianship, will contest, and declaratory judgment actions;

(iv) prepared, reviewed or supervised the preparation of federal estate tax returns, North Carolina inheritance tax returns, and federal and state fiduciary income tax returns, including representation before the Internal Revenue Service and the North Carolina Department of Revenue in connection with such tax returns and related controversies.

(2) Practice shall mean substantive legal work done primarily for the purpose of legal advice or representation, or a practice equivalent.

(3) Practice equivalent shall mean

(A) receipt of an LL.M. degree in taxation or estate planning and probate law (or such other related fields approved by the specialty committee and the board from an approved law school) may

be substituted for one year of experience to meet the five-year requirement;

(B) service as a trust officer with a corporate fiduciary having duties primarily in the area of estate and trust administration, may be substituted for one year of experience to meet the five-year requirement;

(C) service as a law professor concentrating in the teaching of taxation or estate planning and probate law (or such other related fields approved by the specialty committee and the board). Such service may be substituted for one year of experience to meet the five-year requirement.

(c) **Continuing Legal Education** - An applicant must have earned no less than 72 hours of accredited continuing legal education (CLE) credits in estate planning and probate law during the three years preceding application. Of the 72 hours of CLE, at least 45 hours shall be in estate planning and probate law, and the balance may be in the related areas of taxation, business organizations, real property, and family law.

(d) **Peer Review** - An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges, all of whom are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice in North Carolina. An applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(2) The references shall be given on standardized forms provided by the board with the application for certification in the specialty field. These forms shall be returned directly to the specialty committee.

(e) **Examination** - The applicant must pass a written examination designed to test the applicant's knowledge and ability in estate planning and probate law.

(1) **Terms** - The examination shall be in written form and shall be given annually. The examination shall be administered and graded uniformly by the specialty committee.

(2) **Subject Matter** - The examination shall cover the applicant's knowledge and application of the law in the following topics:

(A) federal and North Carolina gift taxes;

(B) federal estate tax;

(C) North Carolina inheritance tax;

(D) federal and North Carolina fiduciary income taxes;

(E) federal and North Carolina income taxes as they apply to the final returns of the decedent and his or her surviving spouse;

(F) North Carolina law of wills and trusts;

(G) North Carolina probate law, including fiduciary accounting;

(H) federal and North Carolina income and gift tax laws as they apply to revocable and irrevocable inter vivos trusts;

(I) North Carolina law of business organizations, family law, and property law as they may be applicable to estate planning transactions;

(J) federal and North Carolina tax law applicable to partnerships and corporations (including S corporations) which may be encountered in estate planning and administration.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.2306 Standards for Continued Certification as a Specialist**

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2306(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - The specialist must demonstrate that, for each of the five years preceding application, he or she has had substantial involvement in the specialty as defined in Rule .2305(b) of this subchapter.

(b) Continuing Legal Education - Since last certified, a specialist must have earned no less than 120 hours of accredited continuing legal education credits in estate planning and probate law. Of the 120 hours of CLE, at least 75 hours shall be in estate planning and probate law, and the balance may be in the related areas of taxation, business organizations, real property, and family law.

(c) Peer Review - The specialist must comply with the requirements of Rule .2305(d) of this subchapter.

(d) Time for Application - Application for continued certification shall be made not more than 180 days nor less than 90 days prior to the expiration of the prior period of certification.

(e) Lapse of Certification - Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Rule .2305 of this subchapter, including the examination.

(f) Suspension or Revocation of Certification - If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Rule .2305 of this subchapter.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.2307 Applicability of Other Requirements**

The specific standards set forth herein for certification of specialists in estate planning and probate law are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

## **Section .2400 Certification Standards for the Family Law Specialty**

### **.2401 Establishment of Specialty Field**

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates family law as a field of law for which certification of specialists under the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) is permitted.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.2402 Definition of Specialty**

The specialty of family law is the practice of law relating to marriage, divorce, alimony, child custody and support, equitable distribution, enforcement of support, domestic violence, bastardy, and adoption.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.2403 Recognition as a Specialist in Family Law**

If a lawyer qualifies as a specialist in family law by meeting the standards set for the specialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Family Law."

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.2404 Applicability of Provisions of the North Carolina Plan of Legal Specialization**

Certification and continued certification of specialists in family law shall be governed by the provisions of the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) as supplemented by these standards for certification.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.2405 Standards for Certification as a Specialist in Family Law**

Each applicant for certification as a specialist in family law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification as a specialist in family law:

(a) Licensure and Practice - An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

(b) Substantial Involvement - An applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of family law.

(1) Substantial involvement shall mean during the five years preceding the application, the applicant has devoted an average of at least 600 hours a year to the practice of family law, and not less than 400 hours during any one year.

(2) Practice shall mean substantive legal work done primarily for the purpose of legal advice or representation, or a practice equivalent.

(3) Practice equivalent shall mean

(A) service as a law professor concentrating in the teaching of family law. Such service may be substituted for one year of experience to meet the five-year requirement.

(B) service as a district court judge in North Carolina, hearing a substantial number of family law cases. Such service may be substituted for one year of experience to meet the five-year requirement.

(c) Continuing Legal Education - An applicant must have earned no less than 45 hours of accredited continuing legal education (CLE) credits in family law, 9 of which may be in related fields, during the three years preceding application, with not less than 9 credits in any one year. Related fields shall include taxation, trial advocacy, evidence, negotiation, and juvenile law.

(d) Peer Review - An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice in North Carolina. An applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(2) The references shall be given on standardized forms provided by the board with the application for certification in the specialty field. These forms shall be returned directly to the specialty committee.

(e) Examination - The applicant must pass a written examination designed to test the applicant's knowledge and ability in family law.

(1) Terms - The examination shall be in written form and shall be given annually. The examination shall be administered and graded uniformly by the specialty committee.

(2) Subject Matter - The examination shall cover the applicant's knowledge and application of the law relating to marriage, divorce, alimony, child custody and support, equitable distribution, enforcement of support, domestic violence, bastardy, and adoption including, but not limited to, the following:

(A) contempt (Chapter 5A of the North Carolina General Statutes);

(B) adoptions (Chapter 48);

(C) bastardy (Chapter 49);

(D) divorce and alimony (Chapter 50);

(E) Uniform Child Custody Jurisdiction Act (Chapter 50A);

(F) domestic violence (Chapter 50B);

(G) marriage (Chapter 51);

(H) powers and liabilities of married persons (Chapter 52);

(I) Uniform Reciprocal Enforcement of Support Act (Chapter 52A);

(J) Uniform Premarital Agreement Act (Chapter 52B);

(K) termination of parental rights, as relating to adoption and termination for failure to provide support (Article 24B of Chapter 7A);

(L) garnishment and enforcement of child support obligations (Chapter 110-136 et. seq.).

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### **.2406 Standards for Continued Certification as a Specialist**

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2406(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - The specialist must demonstrate that, for each of the five years preceding application, he or she has had substantial involvement in the specialty as defined in Rule .2405(b) of this subchapter.

(b) Continuing Legal Education - Since last certified, a specialist must have earned no less than 60 hours of accredited continuing legal education credits in family law or related fields. Not less than nine credits may be earned in any one year, and no more than twelve credits may be in related fields. Related fields shall include taxation, trial advocacy, evidence, negotiation, and juvenile law.

(c) Peer Review - The specialist must comply with the requirements of Rule .2405(d) of this subchapter.

(d) Time for Application - Application for continued certification shall be made not more than 180 days nor less than 90 days prior to the expiration of the prior period of certification.

(e) Lapse of Certification - Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Rule .2405 of this subchapter, including the examination.

(f) Suspension or Revocation of Certification - If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Rule .2405 of this subchapter.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### **.2407 Applicability of Other Requirements**

The specific standards set forth herein for certification of specialists in family law are subject to any general requirement, standards, or procedure adopted by the board applicable to all applicants for certification or continued certification.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **Section .2500 Certification Standards for the Criminal Law Specialty**

#### **.2501 Establishment of Specialty Field**

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates criminal law, including the subspecialties of criminal appellate practice and state criminal law, as a field of law for which certification of specialists under the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) is permitted.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### **.2502 Definition of Specialty**

The specialty of criminal law is the practice of law dealing with the defense or prosecution of those charged with misdemeanor and felony crimes in state and federal trial and appellate courts. Subspecialties in the field are identified and defined as follows:

(a) Criminal Appellate Practice - The practice of criminal law at the appellate court level;

(b) State Criminal Law - The practice of criminal law in state trial and appellate courts.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### **.2503 Recognition as a Specialist in Criminal Law**

A lawyer may qualify as a specialist by meeting the standards set for criminal law or the subspecialties of criminal appellate practice or state criminal law. If a lawyer qualifies as a specialist by meeting the standards set for the criminal law specialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Criminal Law." If a lawyer qualifies as a specialist by meeting the standards set for the subspecialty of criminal appellate practice, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Criminal Appellate Practice." If a lawyer qualifies as a specialist by meeting the standards set for the subspecialty of state criminal law, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in State Criminal Law." If a lawyer qualifies as a specialist by meeting the standards set for both criminal law and the subspecialty of criminal appellate practice, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Criminal Law and Criminal Appellate Practice."

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### **.2504 Applicability of Provisions of the North Carolina Plan of Legal Specialization**

Certification and continued certification of specialists in criminal law shall be governed by the provisions of the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) as supplemented by these standards for certification.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### **.2505 Standards for Certification as a Specialist**

Each applicant for certification as a specialist in criminal law, the subspecialty of state criminal law, or the subspecialty of criminal appellate practice shall meet the minimum standards set forth in Rule .1720 of this

subchapter. In addition each applicant shall meet the following standards for certification:

(a) **Licensure and Practice** - An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of the application. During the period of certification an applicant shall continue to be licensed and in good standing to practice law in North Carolina.

(b) **Substantial Involvement** - An applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of criminal law.

(1) For the specialty of criminal law and the subspecialty of state criminal law, the applicant must have been engaged in the active practice of law for at least five years prior to certification with a substantial involvement in the area of criminal law. Substantial involvement shall mean

(A) during the applicant's entire legal career, the applicant must have been participating counsel of record in criminal proceedings as follows:

(i) five felony jury trials in cases submitted to jury for decision;

(ii) ten additional jury trials, regardless of offenses, submitted to jury for decision;

(iii) fifty additional criminal matters to disposition in the state district or superior courts, or in the U.S. district court (disposition being defined as the conclusion of a criminal matter);

(iv) any one of the following:

(a) two oral appearances before an appellate court of the State of North Carolina or the United States; or

(b) three written appearances before any appellate court in which the applicant certifies that he or she had primary responsibility for the preparation of the record on appeal and brief; or

(c) 25 additional criminal trials in any jurisdiction which were submitted to the judge or jury for decision.

(B) during the five years immediately preceding application to the board, the applicant must have

(i) appeared as participating counsel for at least 25 days in the jury trial of one or more criminal cases, whether to verdict or not;

(ii) made 75 court appearances in any substantive nonjury trials or proceedings (excluding calendar calls, continuance motions, or other purely administrative matters) in a criminal court of any jurisdiction;

(iii) devoted an average of 500 hours per year in the area of criminal law but not less than 400 hours in any one year.

(C) upon recommendation by the specialty committee and approval by the board, where the profession or the geographical location of an applicant prohibits his or her completing the requirements in Rule .2505(b)(1)(A) and (b) above, and the applicant shows substantial involvement in other areas of law requiring similar skills, or has engaged in research, writing, or teaching special studies of criminal law and procedure, to include criminal appellate law, said applicant may substitute such experience for one year of the five required years of Rule .2505(b)(1)(B)(iii) above and must meet all of the requirements of Rule .2505(b)(1)(A)(iv) above and three-fifths of the remaining requirements of Rule .2505(b)(1)(B) above.

(2) For the subspecialty of criminal appellate practice, the applicant must have been engaged in the active practice of law for at least five years prior to certification with a substantial involvement in the area of criminal law. For the subspecialty of criminal appellate practice, substantial involvement shall mean

(A) the applicant must have been engaged in the active practice of law for at least five years prior to certification, (unless excepted

under Rule .2505(b)(2)(B)(ii) below). During the applicant's entire legal career, the applicant must have completed the requirements set forth in Rule .2505(b)(1)(A) above;

(B) during the applicant's entire legal career, the applicant must have also

(i) represented a party in at least 15 criminal appeals, 5 of which must have been within the two years preceding the application;

(ii) had substantial involvement in criminal appellate work, including brief writing, motion practice, oral arguments, and extraordinary writs. Sitting as an appellate court judge for at least one year of the three years preceding application will fulfill three years of the practice requirements.

(C) upon recommendation by the specialty committee and approval by the board, where the profession or the geographical location of an applicant prohibits his or her completion of all or a portion of the requirements of Rule .2505(b)(2)(A) above and the applicant can show substantial involvement in other areas of law requiring similar skills, or has engaged in research, writing, or teaching special studies of criminal law and procedure, to include criminal appellate law, said applicant may substitute such experience for one year of the required five years and may qualify by meeting all of the requirements of Rules .2505(b)(1)(A)(i) and (ii) above, and upon the showing of the representation of at least five criminal appellate actions within the last two years.

(c) **Continuing Legal Education**

(1) In the specialty of criminal law, the state criminal law subspecialty, and the criminal appellate practice subspecialty, an applicant must have earned no less than 40 hours of accredited continuing legal education credits in criminal law during the three years preceding the application, which 40 hours must include the following:

(A) at least 34 hours in skills pertaining to criminal law, such as evidence, substantive criminal law, criminal procedure, criminal trial advocacy, criminal trial tactics, and appellate advocacy;

(B) at least 6 hours in the area of ethics and criminal law.

(2) In order to be certified as a specialist in both criminal law and the subspecialty of criminal appellate law, an applicant must have earned no less than 46 hours of accredited continuing legal education credits in criminal law during the three years preceding application, which 46 hours must include the following:

(A) at least 40 hours in skills pertaining to criminal law, such as evidence, substantive criminal law, criminal procedure, criminal trial advocacy, criminal trial tactics, and appellate advocacy;

(B) at least 6 hours in the area of ethics and criminal law.

(d) **Peer Review**

(1) Each applicant for certification as a specialist in criminal law, the subspecialty of state criminal law, and the subspecialty of criminal appellate practice must make a satisfactory showing of qualification through peer review.

(2) All references must be licensed and in good standing to practice in North Carolina and must be familiar with the competence and qualifications of the applicant in the specialty field. The applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualifications.

(3) Written peer reference forms will be sent by the board or the specialty committee to the references. Completed peer reference forms must be received from at least five of the references. The board or the specialty committee may contact in person or by telephone any reference listed by an applicant.

(A) Each applicant for certification as a specialist in the specialty of criminal law and in the subspecialty of state criminal law

must provide for reference and independent inquiry the names and addresses of the following:

- (i) four attorneys of generally recognized stature who practice in the field of criminal law;
- (ii) two judges of different jurisdictions before whom the applicant has litigated a case to disposition within the previous two years;
- (iii) opposing counsel, cocounsel, and judges in the last five jury trials conducted by the applicant;
- (iv) opposing counsel, cocounsel, and judges in the last five nonjury trials or procedures conducted by the applicant;
- (v) if the applicant has participated in appellate matters, opposing counsel, cocounsel, and judges in the last two appellate matters conducted by the applicant as well as copies of all briefs filed by the applicant in these two appellate matters;
- (vi) if an applicant has not prepared any appellate briefs, then the applicant shall submit to the specialty committee two separate trial court memoranda submitted to a trial court within the last three years which were prepared and filed by the applicant.

(B) An applicant for the subspecialty of criminal appellate practice shall provide the names and addresses of the following:

- (i) four attorneys of generally recognized stature to attest to the applicant's substantial involvement and competence in criminal appellate practice. Such lawyers shall be substantially involved in criminal appellate practice and familiar with the applicant's practice;
- (ii) two judges before whom the applicant has appeared in criminal appellate matters within the last two years to attest to the applicant's substantial involvement and competence in criminal appellate practices;
- (iii) opposing counsel, judges, and any cocounsel in the last two appellate matters the applicant has handled. The applicant shall also provide all briefs filed in these matters.

(C) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(e) Examination - The applicant must pass a written examination designed to test the applicant's knowledge and ability.

(1) Terms - The examination(s) shall be in written form and shall be given at such times as the board deems appropriate. The examination(s) shall be administered and graded uniformly by the specialty committee.

(2) Subject Matter

(A) The examination shall cover the applicant's knowledge in the following topics in criminal law, in the subspecialty of state criminal law, and/or in the subspecialty of criminal appellate practice, as the applicant has elected:

- (i) the North Carolina and Federal Rules of Evidence;
- (ii) state and federal criminal procedure and state and federal laws affecting criminal procedure;
- (iii) constitutional law;
- (iv) appellate procedure and tactics;
- (v) trial procedure and trial tactics;
- (vi) criminal substantive law;
- (vii) the North Carolina Rules of Appellate Procedure.

(B) An applicant for certification in the specialty of criminal law shall take part I (covering state law) and part II (covering federal law) of the criminal law examination. An applicant for certification in the subspecialty of state criminal law shall take part I of the criminal law examination.

(3) Requirement of Criminal Law Examination for Criminal Appellate Practice - An applicant for certification in the subspecialty of

criminal appellate practice must successfully pass the examination in criminal law. If an applicant for certification in criminal appellate practice is already certified as a specialist in the subspecialty of state criminal law, then the applicant must take part II (covering federal law) of the examination in criminal law as well as the criminal appellate practice examination.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.2506 Standards for Continued Certification as a Specialist**

The period of certification is five years. A certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2506(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - The specialist must demonstrate that for the five years preceding reapplication he or she has had substantial involvement in the specialty or subspecialty as defined in Rule .2505(b)(1)(B) and (C) of this subchapter for the specialty of criminal law and the subspecialty of state criminal law, and Rule .2505(b)(2) of this subchapter for the subspecialty of criminal appellate practice.

(b) Continuing Legal Education - The specialist must have earned no less than 65 hours of accredited continuing legal education credits in criminal law with not less than 6 credits earned in any one year.

(c) Peer Review - The specialist must comply with the requirements of Rule .2505(d) of this subchapter.

(d) Time for Application - Application for continuing certification shall be made not more than 180 days nor less than 90 days prior to the expiration of the prior period of certification.

(e) Lapse of Certification - Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Rule .2505 of this subchapter, including the examination.

(f) Suspension or Revocation of Certification - If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Rule .2505 of this subchapter.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.2507 Applicability of Other Requirements**

The specific standards set forth herein for certification of specialists in criminal law, the subspecialty of state criminal law and the subspecialty of criminal appellate practice are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

## SUBCHAPTER E

### Regulations for Organizations Practicing Law

#### **Section .0100 Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law**

##### **.0101 Authority, Scope, and Definitions**

(a) Authority - Chapter 55B of the General Statutes of North Carolina, being "the Professional Corporation Act," particularly Section 55B-12, and Chapter 57C, being the "North Carolina Limited Liability Company Act," particularly Section 57C-2-01(c), authorizes the Council of the North Carolina State Bar (the council) to adopt regulations for professional corporations and professional limited liability companies practicing law. These regulations are adopted by the council pursuant to that authority.

(b) Statutory Law - These regulations only supplement the basic statutory law governing professional corporations (Chapter 55B) and professional limited liability companies (Chapter 57C) and shall be interpreted in harmony with those statutes and with other statutes and laws governing corporations and limited liability companies generally.

(c) Definitions - All terms used in these regulations shall have the meanings set forth below or shall be as defined in the Professional Corporation Act or the North Carolina Limited Liability Company Act as appropriate.

(1) "Council" shall mean the Council of the North Carolina State Bar.

(2) "Licensee" shall mean any natural person who is duly licensed to practice law in North Carolina.

(3) "Professional limited liability company or companies" shall mean any professional limited liability company or companies organized for the purpose of practicing law in North Carolina.

(4) "Professional corporations" shall mean any professional corporation or corporations organized for the purpose of practicing law in North Carolina.

(5) "Secretary" shall mean the secretary of the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

##### **.0102 Name of Professional Corporation or Professional Limited Liability Company**

(a) Name of Professional Corporation - The name of every professional corporation shall contain the surname of one or more of its shareholders or of one or more persons who were associated with its immediate corporate, individual, partnership, or professional limited liability company predecessor in the practice of law and shall not contain any other name, word, or character (other than punctuation marks and conjunctions) except as required or permitted by Rules .0102(a)(1),(2) and(5) below. The following additional requirements shall apply to the name of a professional corporation:

(1) Corporate Designation - The name of a professional corporation shall end with the following words:

(A) "Professional Association" or the abbreviation "P.A."; or

(B) "Professional Corporation" or the abbreviation "P.C."

(2) Deceased or Retired Shareholder - The surname of any shareholder of a professional corporation may be retained in the corporate name after such person's death, retirement or inactivity due to age or disability, even though such person may have disposed of his or her shares of stock in the professional corporation;

(3) Disqualified Shareholder - If a shareholder in a professional corporation whose surname appears in the corporate name becomes a

"disqualified person" as that term is defined in the Professional Corporation Act, the name of the professional corporation shall be promptly changed to eliminate the name of such shareholder, and such shareholder shall promptly dispose of his or her shares of stock in the corporation;

(4) Shareholder Becomes Judge or Official - If a shareholder in a professional corporation whose surname appears in the corporate name becomes a judge or other adjudicatory officer or holds any other office which disqualifies such shareholder to practice law, the name of the professional corporation shall be promptly changed to eliminate the name of such shareholder and such person shall promptly dispose of his or her shares of stock in the corporation;

(5) Trade Name Allowed - A professional corporation shall not use any name other than its corporate name, except to the extent a trade name or other name is required or permitted by statute, rule of court or the Rules of Professional Conduct.

(b) Name of Professional Limited Liability Company - The name of every professional limited liability company shall contain the surname of one or more of its members or one or more persons who were associated with its immediate corporate, individual, partnership, or professional limited liability company predecessor in the practice of law and shall not contain any other name, word or character (other than punctuation marks and conjunctions) except as required or permitted by Rules .0102(b)(1),(2) and(5) below. The following requirements shall apply to the name of a professional limited liability company:

(1) Professional Limited Liability Company Designation - The name of a professional limited liability company shall end with the words "Professional Limited Liability Company" or the abbreviation "P.L.L.C.";

(2) Deceased or Retired Member - The surname of any member of a professional limited liability company may be retained in the limited liability company name after such person's death, retirement, or inactivity due to age or disability, even though such person may have disposed of his or her interest in the professional limited liability company;

(3) Disqualified Member - If a member of a professional limited liability company whose surname appears in the name of such professional limited liability company becomes a "disqualified person" as that term is defined in the Professional Corporation Act, the name of the professional limited liability company shall be promptly changed to eliminate the name of such member, and such member shall promptly dispose of his or her interest in the professional limited liability company;

(4) Member Becomes Judge or Official - If a member of a professional limited liability company whose surname appears in the professional limited liability company name becomes a judge or other adjudicatory official or holds any other office which disqualifies such person to practice law, the name of the professional limited liability company shall be promptly changed to eliminate the name of such member and such person shall promptly dispose of his or her interest in the professional limited liability company;

(5) Trade Name Allowed - A professional limited liability company shall not use any name other than its limited liability company name, except to the extent a trade name or other name is required or permitted by statute, rule of court, or the Rules of Professional Conduct.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.0103 Registration with the North Carolina State Bar**

(a) Registration of Professional Corporation - At least one of the incorporators of a professional corporation shall be an attorney at law duly licensed to practice in North Carolina. The incorporators shall comply with the following requirements for registration of a professional corporation with the North Carolina State Bar:

(1) Filing with State Bar - Prior to filing the articles of incorporation with the secretary of state, the incorporators of a professional corporation shall file the following with the secretary of the North Carolina State Bar:

- (A) the original articles of incorporation;
- (B) an additional executed copy of the articles of incorporation;
- (C) a conformed copy of the articles of incorporation;
- (D) a registration fee of fifty dollars;
- (E) an application for certificate of registration for a professional corporation (Form DC-1; see Section .0106(a) of this subchapter) verified by all incorporators, setting forth (i) the names and addresses of each person who will be an original shareholder or an employee who will practice law for the corporation; (ii) the name and address of at least one person who is an incorporator; (iii) the name and address of at least one person who will be an original director; and (iv) the name and address of at least one person who will be an original officer, and stating that all such persons are duly licensed to practice law in North Carolina, and representing that the corporation will be conducted in compliance with the Professional Corporation Act and these regulations; and
- (F) a certification for professional corporation by the Council of the North Carolina State Bar (Form PC-2; see Rule .0106(b) of this subchapter), a copy of which shall be attached to the original, the executed copy, and the conformed copy of the articles of incorporation, to be executed by the secretary in accordance with Rule .0103(a)(2) below.

(2) Certificates Issued by Secretary and Council - The secretary shall review the articles of incorporation for compliance with the laws relating to professional corporations and these regulations. If the secretary determines that all persons who will be original shareholders are duly licensed to practice law in North Carolina and that the articles of incorporation conform with the laws relating to professional corporations and these regulations, the secretary shall take the following actions:

- (A) execute the certification for professional corporation by the Council of the North Carolina State Bar (Form PC-2; see Rule .0106(b) of this subchapter) attached to the original, the executed copy, and the conformed copy of the articles of incorporation and return the original and the conformed copies of the articles of incorporation, together with the attached certificates, to the incorporators for filing with the secretary of state;
- (B) retain the executed copy of the articles of incorporation together with the application (Form PC-1) and the certification of council (Form PC-2) in the office of the North Carolina State Bar as a permanent record;
- (C) issue a certificate of registration for a professional corporation (Form PC-3; see Rule .0106(c) of this subchapter) to the professional corporation to become effective upon the effective date of the articles of incorporation after said articles are filed with the secretary of state.

(b) Registration of a Professional Limited Liability Company - At least one of the persons executing the articles of organization of a professional limited liability company shall be an attorney at law duly licensed to practice law in North Carolina. The persons executing the articles of organization shall comply with the following requirements for registration with the North Carolina State Bar:

(1) Filing with State Bar - Prior to filing the articles of organization with the secretary of state, the persons executing the articles of organization of a professional limited liability company shall file the following with the secretary of the North Carolina State Bar:

- (A) the original articles of organization;
- (B) an additional executed copy of the articles of organization;
- (C) a conformed copy of the articles of organization;
- (D) a registration fee of \$50;
- (E) an application for certificate of registration for a professional limited liability company (Form PLLC-1; see Rule .0106(f) of this subchapter) verified by all of the persons executing the articles of organization, setting forth (i) the names and addresses of each original member or employee who will practice law for the professional limited liability company; (ii) the name and address of at least one person executing the articles of organization; and (iii) the name and address of at least one person who will be an original manager, and stating that all such persons are duly licensed to practice law in North Carolina, and representing that the professional limited liability company will be conducted in compliance with the North Carolina Limited Liability Company Act and these regulations;
- (F) a certification for professional limited liability company by the Council of the North Carolina State Bar, (Form PLLC-2; see Rule .0106(g) of this subchapter), a copy of which shall be attached to the original, the executed copy, and the conformed copy of the articles of organization, to be executed by the secretary in accordance with Rule .0103(b)(2) below.

(2) Certificates Issued by the Secretary - The secretary shall review the articles of organization for compliance with the laws relating to professional limited liability companies and these regulations. If the secretary determines that all of the persons who will be original members are duly licensed to practice law in North Carolina and the articles of organization conform with the laws relating to professional limited liability companies and these regulations, the secretary shall take the following actions:

- (A) execute the certification for professional limited liability company by the Council of the North Carolina State Bar (Form PLLC-2) attached to the original, the executed copy and the conformed copy of the articles of organization and return the original and the conformed copy of the articles of organization, together with the attached certificates, to the persons executing the articles of organization for filing with the secretary of state;
- (B) retain the executed copy of the articles of organization together with the application (Form PLLC-1) and the certification (Form PLLC-2) in the office of the North Carolina State Bar as a permanent record;
- (C) issue a certificate of registration for a professional limited liability company (Form PLLC-3; see Rule .0106(h) of this subchapter) to the professional limited liability company to become effective upon the effective date of the articles of organization after said articles are filed with the secretary of state.

(c) Refund of Registration Fee - If the secretary is unable to make the findings required by Rules .0103(a)(2) or .0103(b)(2) above, the secretary shall refund the \$50 registration fee.

(d) Expiration of Certificate of Registration - The initial certificate of registration for either a professional corporation or a professional limited liability company shall remain effective through June 30 following the date of registration.

(e) Renewal of Certificate of Registration - The certificate of registration for either a professional corporation or a professional limited liability company shall be renewed on or before July 1 of each year upon the following conditions:

(1) **Renewal of Certificate of Registration for Professional Corporation** - A professional corporation shall submit an application for renewal of certificate of registration for a professional corporation (Form PC-4; see Rule .0106(d) of this subchapter) to the secretary listing the names and addresses of all of the shareholders and employees of the corporation who practice law for the professional corporation and the name and address of at least one officer and one director of the professional corporation, and certifying that all such persons are duly licensed to practice law in the state of North Carolina and representing that the corporation has complied with these regulations and the provisions of the Professional Corporation Act. Upon a finding by the secretary that the representations in the application are correct, the secretary shall renew the certificate of registration by making a notation in the records of the North Carolina State Bar;

(2) **Renewal of Certificate of Registration for a Professional Limited Liability Company** - A professional limited liability company shall submit an application for renewal of certificate of registration for a professional limited liability company (Form PLLC-4; see Rule .0106(i) of this subchapter) to the secretary listing the names and addresses of all of the members and employees of the professional limited liability company who practice law, and the name and address of at least one manager, and certifying that all such persons are duly licensed to practice law in the state of North Carolina, and representing that the professional limited liability company has complied with these regulations and the provisions of the North Carolina Limited Liability Company Act. Upon a finding by the secretary that the representations in the application are correct, the secretary shall renew the certificate of registration by making a notation in the records of the North Carolina State Bar;

(3) **Renewal Fee** - An application for renewal of a certificate of registration for either a professional corporation or a professional limited liability company shall be accompanied by a renewal fee of \$25;

(4) **Refund of Renewal Fee** - If the secretary is unable to make the findings required by Rules .0103(e)(1) or .0103(e)(2) above, the secretary shall refund the \$25 registration fee;

(5) **Failure to Apply for Renewal of Certificate of Registration** - In the event a professional corporation or a professional limited liability company shall fail to submit the appropriate application for renewal of certificate of registration, together with the renewal fee, to the North Carolina State Bar within 30 days following the expiration date of its certificate of registration, the secretary shall send a notice to show cause letter to the professional corporation or the professional limited liability company advising said professional corporation or professional limited liability company of the delinquency and requiring said professional corporation or professional limited liability company to either submit the appropriate application for renewal of certificate of registration, together with the renewal fee, to the North Carolina State Bar within 30 days or to show cause for failure to do so. Failure to submit the application and the renewal fee within said thirty days, or to show cause within said time period, shall result in the suspension of the certificate of registration for the delinquent professional corporation or professional limited liability company and the issuance of a notification to the secretary of state of the suspension of said certificate of registration;

(6) **Reinstatement of Suspended Certificate of Registration** - Upon (a) the submission to the North Carolina State Bar of the appropriate application for renewal of certificate of registration, together with all past due renewal fees; and (b) a finding by the secretary that the representations in the application are correct, a suspended certificate of registration of a professional corporation or professional limited liability company shall be reinstated by the secretary by making a notation in the records of the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### **.0104 Management and Financial Matters**

(a) **Management** - At least one director and one officer of a professional corporation and at least one manager of a professional limited liability company shall be attorneys at law duly licensed to practice in North Carolina.

(b) **Authority Over Professional Matters** - No person affiliated with a professional corporation or a professional limited liability company, other than a licensee, shall exercise any authority whatsoever over the rendering of professional services.

(c) **No Income to Disqualified Person** - The income of a professional corporation or of a professional limited liability company attributable to the practice of law during the time that a shareholder of the professional corporation or a member of a professional limited liability company is a "disqualified person," as such term is defined in G.S. 55B-2(1), or after a shareholder or a member becomes a judge, other adjudicatory officer, or the holder of any other office, as specified in Rules .0102(a)(4) or .0102(b)(4) of this subchapter, shall not in any manner accrue to the benefit of such shareholder, or his or her shares, or to such member.

(d) **Stock of a Professional Corporation** - A professional corporation may acquire and hold its own stock.

(e) **Acquisition of Shares of Deceased or Disqualified Shareholder** - Subject to the provisions of G.S. 55B-7, a professional corporation may make such agreement with its shareholders or its shareholders may make such agreement between themselves as they may deem just for the acquisition of the shares of a deceased or retiring shareholder or a shareholder who becomes disqualified to own shares under the Professional Corporation Act or under these regulations.

(f) **Stock Certificate Legend** - There shall be prominently displayed on the face of all certificates of stock in a professional corporation a legend that any transfer of the shares represented by such certificate is subject to the provisions of the Professional Corporation Act and these regulations.

(g) **Transfer of Stock of Professional Corporation** - When stock of a professional corporation is transferred, the professional corporation shall request that the secretary issue a stock transfer certificate (Form PC-5; see Rule .0106(e) of this subchapter) as required by G.S. 55B-6. The secretary is authorized to issue the certificate which shall be permanently attached to the stub of the transferee's stock certificate in the stock register of the professional corporation. The fee for such certificate shall be two dollars for each transferee listed on the stock transfer certificate.

(h) **Stock Register of Professional Corporation** - The stock register of a professional corporation shall be kept at the principal office of the corporation and shall be subject to inspection by the secretary or his or her delegate during business hours at the principal office of the corporation.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### **.0105 General and Administrative Provisions**

(a) **Administration of Regulations** - These regulations shall be administered by the secretary, subject to the review and supervision of the council. The council may from time to time appoint such standing or special committees as it may deem proper to deal with any matter affecting the administration of these regulations. It shall be the duty of the secretary to bring to the attention of the council or its appropriate committee any violation of the law or of these regulations.

(b) **Appeal to Council** - If the secretary shall decline to execute any certificate required by Rule .0103(a)(2), Rule .0103(b)(2), or Rule .0104(g) of this subchapter, or to renew the same when properly requested, or shall refuse to take any other action requested in writing by a professional corporation or a professional limited liability company, the aggrieved party may request in writing that the council review such action. Upon receipt of such a request, the council shall provide a formal hearing for the aggrieved party through a committee of its members.

(c) Articles of Amendment, Merger, and Dissolution - A copy of the following documents, duly certified by the secretary of state, shall be filed with the secretary within 10 days after filing with the secretary of state:

(1) all amendments to the articles of incorporation of a professional corporation or to the articles of organization of a professional limited liability company;

(2) all articles of merger to which a professional corporation or a professional limited liability company is a party;

(3) all articles of dissolution dissolving a professional corporation or a professional limited liability company;

(4) any other documents filed with the secretary of state changing the corporate structure of a professional corporation or the organizational structure of a professional limited liability company.

(d) Filing Fee - Except as otherwise provided in these regulations, all reports or papers required by law or by these regulations to be filed with the secretary shall be accompanied by a filing fee of two dollars.

(e) Accounting for Filing Fees - All fees provided for in these regulations shall be the property of the North Carolina State Bar and shall be deposited by the secretary to its account, and such account shall be separately stated on all financial reports made by the secretary to the council and on all financial reports made by the council.

(f) Records of State Bar - The secretary shall keep a file for each professional corporation and each professional limited liability company which shall contain the executed articles of incorporation or organization, all amendments thereto, and all other documents relating to the affairs of the corporation or professional limited liability company.

(g) Additional Information - A professional corporation or a professional limited liability corporation shall furnish to the secretary such information and documents relating to the administration of these regulations as the secretary or the council may reasonably request.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

## .0106 Forms

### (a) Form PC-1: Application for Certificate of Registration for a Professional Corporation

The undersigned, being all of the incorporators of \_\_\_\_\_, a professional corporation to be incorporated under the laws of the state of North Carolina for the purpose of practicing law, hereby certify to the Council of the North Carolina State Bar:

1. At least one person who is an incorporator, at least one person who will be an original officer, and at least one person who will be an original director, and all persons who, to the best knowledge and belief of the undersigned, will be original shareholders and employees who will practice law for said professional corporation are duly licensed to practice law in the state of North Carolina. The names and addresses of such persons are:

Name and Position

Address (incorporator, officer, director, shareholder, employee)

2. To the best of our knowledge and belief, all of the persons listed above are duly licensed to practice law in the state of North Carolina.

3. The undersigned represent that the professional corporation will be conducted in compliance with the Professional Corporations Act and with the North Carolina State Bar's Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law.

4. Application is hereby made for a Certificate of Registration to be effective upon the effective date of the professional corporation's articles of incorporation after said articles are filed with the secretary of state.

5. Attached hereto is the registration fee of \$50.

This the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_.

\_\_\_\_\_  
Incorporator

\_\_\_\_\_  
Incorporator

\_\_\_\_\_  
Incorporator

[Signatures of all incorporators.]

NORTH CAROLINA \_\_\_\_\_ COUNTY

I hereby certify that \_\_\_\_\_,

\_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_, being all of the incorporators of \_\_\_\_\_, a professional corporation, personally appeared before me this day and stated that they have read the foregoing Application for Certificate of Registration for a Professional Corporation and that the statements contained therein are true.

Witness my hand and notarial seal, this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_.

\_\_\_\_\_  
Notary Public

My commission expires: \_\_\_\_\_

### (b) Form PC-2: Certification for Professional Corporation by Council of the North Carolina State Bar

The incorporators of \_\_\_\_\_, a professional corporation, have certified to the Council of the North Carolina State Bar the names and addresses of all persons who will be original owners of said professional corporation's shares.

Based upon that certification and my examination of the roll of attorneys licensed to practice law in the state of North Carolina, I hereby certify that each person who will be an original owner of the shares of stock of said professional corporation is duly licensed to practice law in the state of North Carolina.

This certificate is executed under the authority of the Council of the North Carolina State Bar, this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_.

\_\_\_\_\_  
Secretary of the  
North Carolina State Bar

[This certificate is required by G.S. 55B-4(4) and must be attached to the original articles of incorporation when filed with the secretary of state. See Rule .0103(a)(2) of this subchapter.]

### (c) Form PC-3: Certificate of Registration for a Professional Corporation

It appears that \_\_\_\_\_, a professional corporation, has met all of the requirements of G.S. 55B-4, G.S. 55B-6 and the Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law of the North Carolina State Bar.

By the authority of the Council of the North Carolina State Bar, I hereby issue this Certificate of Registration for a Professional Corporation pursuant to the provisions of G.S. 55B-10 and the North Carolina State Bar's Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law.

This registration is effective upon the effective date of the articles of incorporation of said professional corporation, after said articles are filed with the secretary of state, and expires on June 30, 19\_\_.

This the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_.

\_\_\_\_\_  
Secretary of the  
North Carolina State Bar

### (d) Form PC-4: Application for Renewal of Certificate of Registration for Professional Corporation

Application is hereby made for renewal of the Certificate of Registration for Professional Corporation of \_\_\_\_\_, a professional corporation.

In support of this application, the undersigned hereby certify to the Council of the North Carolina State Bar:

1. At least one of the officers and one of the directors, and all of the shareholders and employees of said professional corporation who practice law for said professional corporation are duly licensed to practice law in the state of North Carolina. The names and addresses of such persons are:

Name and Position

Address (officer, director, shareholder, employee)

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

2. At all times since the issuance of its Certificate of Registration for Professional Corporation, said professional corporation has complied with the North Carolina State Bar's Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law and with the Professional Corporations Act.

3. Attached hereto is the renewal fee of \$25.

This the \_\_\_\_ day of \_\_\_\_\_, 19\_\_.

\_\_\_\_\_, (Professional Corporation)

By \_\_\_\_\_ President (or Chief Executive)

NORTH CAROLINA \_\_\_\_\_ COUNTY

I hereby certify that \_\_\_\_\_, being the \_\_\_\_\_ of \_\_\_\_\_, a professional corporation, personally appeared before me this day and stated that he/she has read the foregoing Application for Renewal of Certificate of Registration for Professional Corporation and that the statements contained therein are true.

Witness my hand and notarial seal, this \_\_\_\_ day of \_\_\_\_\_, 19\_\_.

\_\_\_\_\_, Notary Public

My commission expires: \_\_\_\_\_

**(e) Form PC-5: North Carolina State Bar Stock Transfer Certificate**

I hereby certify that \_\_\_\_\_ (transferee) is duly licensed to practice law in the State of North Carolina and as of this date may be a transferee of shares of stock in a professional corporation formed to practice law in the state of North Carolina.

This certificate is executed under the authority of the Council of the North Carolina State Bar, this \_\_\_\_ day of \_\_\_\_\_, 19\_\_.

\_\_\_\_\_, Secretary of the North Carolina State Bar

[This certificate is required by G.S. 55B-6 and must be attached to the transferee's stock certificate. See Rule .0104(g) of this subchapter.]

**(f) Form PLLC-1: Application for Certificate of Registration for a Professional Limited Liability Company**

The undersigned, being all of the persons executing the articles of organization of \_\_\_\_\_, a professional limited liability company to be organized under the laws of the state of North Carolina for the purpose of practicing law, hereby certify to the Council of the North Carolina State Bar:

1. At least one person executing the articles of organization, at least one person who will be an original manager, and all persons who, to the best knowledge and belief of the undersigned, will be original members and employees who will practice law for said professional limited liability

company are duly licensed to practice law in the state of North Carolina. The names and addresses of all such persons are:

Name and Position

Address (signer of articles, manager, member, employee)

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

2. To the best of our knowledge and belief, all of the persons listed above are duly licensed to practice law in the state of North Carolina.

3. The undersigned represent that the professional limited liability company will be conducted in compliance with the North Carolina Limited Liability Company Act and with the North Carolina state Bar's Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law.

4. Application is hereby made for a Certificate of Registration to be effective upon the effective date of the professional limited liability company's articles of organization after said articles are filed with the secretary of state.

5. Attached hereto is the registration fee of \$50.

This the \_\_\_\_ day of \_\_\_\_\_, 19\_\_.

\_\_\_\_\_, [Signatures of all persons executing

articles of organization.]

NORTH CAROLINA \_\_\_\_\_ COUNTY

I hereby certify that \_\_\_\_\_,

\_\_\_\_\_, and \_\_\_\_\_, being all of the persons executing the articles of organization of \_\_\_\_\_,

a professional limited liability company, personally appeared before me this day and stated that they have read the foregoing Application for Certificate of Registration for a Professional Limited Liability Company and that the statements contained therein are true.

Witness my hand and notarial seal, this \_\_\_\_ day of \_\_\_\_\_, 19\_\_.

\_\_\_\_\_, Notary Public

My commission expires: \_\_\_\_\_

**(g) Form PLLC-2: Certification for Professional Limited Liability Company by Council of the North Carolina State Bar**

All of the persons executing the articles of organization of \_\_\_\_\_,

a professional limited liability company, have certified to the Council of the North Carolina State Bar the names and addresses of all persons who will be original members of said professional limited liability company.

Based upon that certification and my examination of the roll of attorneys licensed to practice law in the state of North Carolina, I hereby certify that each person who will be an original member of said professional limited liability company is duly licensed to practice law in the state of North Carolina.

This certificate is executed under the authority of the Council of the North Carolina State Bar, this \_\_\_\_ day of \_\_\_\_\_, 19\_\_.

\_\_\_\_\_, Secretary of the North Carolina State Bar

[This certificate is required by G.S. 55B-4(4) and G.S. 57C-2-01 and must be attached to the original articles of organization when filed with the secretary of state. See Rule .103(b)(2) of this subchapter.]

**(h) Form PLLC-3: Certificate of Registration for a Professional Limited Liability Company**

It appears that \_\_\_\_\_, a professional limited liability company, has met all of the requirements of G.S. 57C-2-01 and the North Carolina State Bar's Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law.

By the authority of the Council of the North Carolina State Bar, I hereby issue this Certificate of Registration for a Professional Limited Liability Company pursuant to the provisions of G.S. 55B-10, G.S. 57C-2-01 and the North Carolina State Bar's Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law.

This registration is effective upon the effective date of the articles of organization of said professional limited liability company, after said articles are filed with the secretary of state, and expires on June 30, 19\_\_.

This the \_\_\_\_ day of \_\_\_\_\_, 19\_\_.

\_\_\_\_\_  
Secretary of the  
North Carolina State Bar

**(i) Form PLLC-4: Application for Renewal of Certificate of Registration for Professional Limited Liability Company**

Application is hereby made for renewal of the Certificate of Registration for Professional Limited Liability Company of \_\_\_\_\_, a professional limited liability company.

In support of this application, the undersigned hereby certify to the Council of the North Carolina State Bar:

1. At least one of the managers, and all of the members and employees of said professional limited liability company who practice law for said professional limited liability company are duly licensed to practice law in the State of North Carolina. The names and addresses of all such persons are:

Name and Position

Address (manager, member, employee)


2. At all times since the issuance of its Certificate of Registration for Professional Limited Liability Company, said professional limited liability company has complied with the North Carolina State Bar's Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law and with the provisions of the North Carolina Limited Liability Company Act.

3. Attached hereto is the renewal fee of \$25.

This the \_\_\_\_ day of \_\_\_\_\_, 19\_\_.

\_\_\_\_\_  
(Professional Limited Liability Company)

By \_\_\_\_\_ Manager

NORTH CAROLINA \_\_\_\_\_ COUNTY

I hereby certify that \_\_\_\_\_, being a manager of \_\_\_\_\_, a professional limited liability company, personally appeared before me this day and stated that he/she has read the foregoing Application for Renewal of Certificate of Registration for Professional Limited Liability Company and that the statements contained therein are true.

Witness my hand and notarial seal, this \_\_\_\_ day of \_\_\_\_\_, 19\_\_.

\_\_\_\_\_  
Notary Public

My commission expires: \_\_\_\_\_

**Section .0200 Registration of Interstate Law Firms**

**.0201 Registration Requirement**

No law firm or professional organization which maintains an office in North Carolina and has among its constituent partners, shareholders, members, or employees attorneys who are not licensed to practice law in North Carolina or has as its partner, shareholder, or member a law firm or professional organization which has among its constituent partners, shareholders, members, or employees attorneys who are not licensed to practice law in North Carolina may do business in North Carolina without first having obtained a certificate of registration.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**.0202 Conditions of Registration**

The secretary of the North Carolina State Bar shall issue such a certificate upon satisfaction of the following conditions precedent:

(1) There shall be filed with the secretary of the North Carolina State Bar a registration statement disclosing:

(a) all names used to identify the filing law firm or professional organization;

(b) addresses of all offices maintained by the filing law firm or professional organization;

(c) the name and address of any law firm or professional organization with which the filing law firm or professional organization is in partnership and the name and address of such partnership;

(d) the name and address of each attorney who is a partner, shareholder, member or employee of the filing law firm or professional organization or who is a partner, shareholder, member or employee of a law firm or professional organization with which the filing law firm or professional organization is in partnership;

(e) the relationship of each attorney identified in Rule .0202(1)(d) above to the filing law firm or professional organization;

(f) the states to which each attorney identified in Rule .0202(1)(d) above is admitted to practice law.

(2) There shall be filed with the registration statement a notarized statement of the filing law firm or professional organization by a member who is licensed in North Carolina certifying that each attorney identified in Rule .0202(1)(d) above who is not licensed to practice law in North Carolina is a member in good standing of each state bar to which the attorney has been admitted.

(3) There shall be filed with the registration statement a notarized statement of the filing law firm or professional organization affirming that each attorney identified in Rule .0202(1)(d) above who is not licensed to practice law in North Carolina will govern his or her personal and professional conduct with respect to legal matters arising from North Carolina in accordance with the Rules of Professional Conduct of the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**.0203 Registration Fee**

There shall be submitted with each registration statement and supporting documentation a registration fee of \$500.00 as administrative cost.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**.0204 Certificate of Registration**

A certificate of registration shall remain effective until January 1 following the date of filing and may be renewed annually by the secretary of the North Carolina State Bar upon the filing of an updated registration statement which satisfies the requirements set forth above and the submission of the registration fee.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### **.0205 Effect of Registration**

This rule shall not be construed to confer the right to practice law in North Carolina upon any lawyer not licensed to practice law in North Carolina.

History Note: Statutory Authority G.S. 84-16; G.S. 84-23  
Readopted Effective December 8, 1994

## **Section .0300 Rules Concerning Prepaid Legal Services Plans**

### **.0301 Registration Requirement**

No licensed North Carolina attorney shall participate in a prepaid legal services plan in this state unless the plan has registered with the North Carolina State Bar and has complied with the rules set forth below.

History Note: Statutory Authority G.S. 84-23; G.S. 84-23.1  
Readopted Effective December 8, 1994.

### **.0302 Registration Site**

A prepaid legal services plan must be registered in the office of the North Carolina State Bar prior to its implementation or operation in North Carolina on forms supplied by the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-23; G.S. 84-23.1  
Readopted Effective December 8, 1994.

### **.0303 Requirement to File Amendments**

Amendments to prepaid legal services plans and to other documents required to be filed upon registration of such plans shall be filed in the office of the North Carolina State Bar no later than 30 days after the adoption of such amendments.

History Note: Statutory Authority G.S. 84-23; G.S. 84-23.1  
Readopted Effective December 8, 1994.

### **.0304 Advertising of State Bar Approval Prohibited**

Prepaid legal services plans approved by the North Carolina State Bar shall register with the North Carolina State Bar on or before January 31, 1992. Effective January 31, 1992, the approval of these existing plans is revoked and the plans shall not advertise, communicate, or represent in any way that the North Carolina State Bar approved the plan.

History Note: Statutory Authority G.S. 84-23; G.S. 84-23.1  
Readopted Effective December 8, 1994.

### **.0305 Annual Registration**

Subsequent to initial registration, all prepaid legal services plans shall be registered annually on or before January 31 on forms supplied by the State Bar.

History Note: Statutory Authority G.S. 84-23; G.S. 84-23.1  
Readopted Effective December 8, 1994.

### **.0306 Registration Fee**

The initial and annual registration fees for each prepaid legal services plan shall be \$100.

History Note: Statutory Authority G.S. 84-23; G.S. 84-23.1  
Readopted Effective December 8, 1994.

### **.0307 Index of Registered Plans**

The North Carolina State Bar shall maintain an index of the prepaid legal services plans registered pursuant to these rules. All documents filed in compliance with this rule are considered public documents and shall be available for public inspection during normal business hours.

History Note: Statutory Authority G.S. 84-23; G.S. 84-23.1  
Readopted Effective December 8, 1994.

### **.0308 State Bar May Not Approve or Disapprove Plans**

The North Carolina State Bar shall not approve or disapprove any prepaid legal services plan or render any legal opinion regarding any plan. The registration of any plan under this rule shall not be construed to indicate approval or disapproval of the plan.

History Note: Statutory Authority G.S. 84-23; G.S. 84-23.1

Readopted Effective December 8, 1994.

### **.0309 State Bar Jurisdiction**

The North Carolina State Bar retains jurisdiction of North Carolina licensed attorneys who participate in prepaid legal services plans and North Carolina licensed attorneys are subject to the rules and regulations governing the practice of law.

History Note: Statutory Authority G.S. 84-23; G.S. 84-23.1  
Readopted Effective December 8, 1994.

## **Section .0400 Rules for Arbitration of Internal Law Firm Disputes**

### **.0401 Purpose**

Subject to these rules, the North Carolina State Bar will administer a voluntary binding arbitration program for resolution of disputed issues between lawyers arising out of the dissolution of law firms or disputes within law firms. The purpose of this arbitration procedure is to provide a mechanism for resolving economic disputes between lawyers arising out of the operation or dissolution of law firms.

History Note: Statutory Authority G.S. 84-23  
Readopted Effective December 8, 1994

### **.0402 Submission to Arbitration**

The program is voluntary. The procedure shall be instituted by a written submission to arbitration agreement, executed by all the parties to the dispute, in a form and manner as provided by the executive director of the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-23  
Readopted Effective December 8, 1994

### **.0403 Jurisdiction**

The procedure may be used for the resolution of any dispute if all of the following conditions are met:

- (a) the disputed issues submitted to arbitration hereunder shall be solely between or among lawyers who are members of the same law firm;
- (b) the dispute arises out of an economic relationship between or among lawyers concerning the operation, dissolution, or proposed dissolution of the law firm of which they are members;
- (c) at least one of the parties to such dispute resides or maintains an office for the practice of law in the state of North Carolina and is a member of the North Carolina State Bar;
- (d) all parties agree in a written submission to arbitration agreement to submit the issues in dispute to binding arbitration under these rules and procedures.

History Note: Statutory Authority G.S. 84-23  
Readopted Effective December 8, 1994

### **.0404 Administration**

The North Carolina State Bar is the administrator of the arbitration program, through its executive director and his designees, to carry out all administrative functions, including those specified in Rules .0406 through .0410 of this subchapter.

History Note: Statutory Authority G.S. 84-23  
Readopted Effective December 8, 1994

### **.0405 Uniform Arbitration Act**

Except as modified herein, all arbitration procedures will be governed by Article 45A of Chapter 1 of the General Statutes of North Carolina (Uniform Arbitration Act). Said Uniform Arbitration Act and any amendments thereto are hereby incorporated by reference and constitute a part of these rules.

History Note: Statutory Authority G.S. 84-23  
Readopted Effective December 8, 1994

#### .0406 List of Arbitrators

The North Carolina State Bar shall establish a list of arbitrators, consisting of attorneys or retired judges, who have been members of the North Carolina State Bar for at least ten years and who have indicated a willingness to serve. The parties shall, in their submission to arbitration agreement, elect to have one or three arbitrators. The administrator shall thereafter provide each party with the list of arbitrators.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### .0407 Selection of Arbitrators

If three arbitrators are to be selected, then

(a) each party to the dispute shall, within ten days after receipt of notice from the administrator, select one arbitrator on the approved list who shall be contacted by the administrator concerning his or her ability to serve and dates of availability. The two arbitrators so chosen shall execute an oath and appointment of arbitrator certificate provided by the administrator. Within fifteen days after certification, the two arbitrators shall choose a third from the administrator's approved list, who shall also execute an oath and appointment certificate. Failure of the two arbitrators to choose a third within the allotted time shall constitute a consent to have the third arbitrator chosen by the administrator;

(b) if the opposing parties cannot, because of the number of parties involved, settle upon two arbitrators who are to choose the third as set forth above, then the administrator shall notify the parties and appoint all three arbitrators from the approved list.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### .0408 Fees and Expenses

All expenses and the arbitrator(s') fees shall be paid by the parties. Arbitrator(s') compensation shall be at the same rate paid to retired judges who are assigned to temporary active service as provided in G.S. 7A-52 or any successor statutory provision. The administrator may require from each party an escrow deposit covering anticipated fees and expenses.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### .0409 Confidentiality

It is the policy of the North Carolina State Bar to protect the confidentiality of all arbitration proceedings. The parties, the arbitrators, and the North Carolina State Bar shall keep all proceedings confidential, except that any final award shall be enforceable under Chapter 1, Article 45A.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### .0410 Authority to Adopt Amendments and Regulations

The North Carolina State Bar may, from time to time, adopt and amend procedures and regulations consistent with these rules and amend or supplement these rules or otherwise regulate the arbitration procedure.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

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# The North Carolina State Bar Rules of Professional Conduct

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# Title 27 of the North Carolina Administrative Code

## The North Carolina State Bar

### Chapter 2

## Rules of Professional Conduct of The North Carolina State Bar

#### Editor's Note

Please note that the designations "DR," "EC," and "CPR" generally refer to disciplinary rules, ethical considerations and ethics opinions, respectively, which were a part of or were promulgated with respect to the North Carolina Code of Professional Responsibility which governed the professional conduct of North Carolina lawyers between 1974 and 1985.

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#### 0.1 Preamble: A Lawyer's Responsibilities

A lawyer is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.

In all professional functions a lawyer should be competent, prompt, and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

As a public citizen, a lawyer should seek improvement of the law, the administration of justice, and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law, and work to strengthen legal education.

A lawyer should render public interest legal service and provide civic leadership. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in

activities for improving the law, society, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

Traditionally, the legal profession has been a group of people united in a learned calling for the public good. At their best, lawyers have assured the availability of legal services to all, regardless of ability to pay, and as leaders of their communities, states, and nation have utilized their education and experience to improve society. It is acknowledged that it is the basic responsibility of each lawyer engaged in the practice of law to provide community service, community leadership, and public interest legal services without fee, or at a substantially reduced fee, in such areas as poverty law, civil rights law, public rights law, charitable organization representation, and the administration of justice.

The rights and responsibilities of individuals and organizations in the United States are increasingly defined in legal terms. As a consequence, voluntary efforts by the profession to provide legal assistance in coping with the web of statutes, rules and regulations are imperative for communities and persons of modest and limited means, as well as for the relatively well-to-do.

The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged. The provision of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally, but the efforts of individual lawyers are often not enough to meet the need. Thus, it has been necessary for the profession and government to institute additional programs to provide legal services.

Accordingly, legal aid offices, lawyer referral services and other related programs have been developed, and others will be developed by the profession and government. Every lawyer should support all proper efforts to meet this need for legal services.

As important as the provision of pro bono legal services is, participation of lawyers in civic leadership is equally important. In the long run, because of their values, education and experience, lawyers who render unpaid service in nonlegal settings to help provide new jobs, improve educational opportunities and meet the spiritual needs of a community, can enhance the quality of life of all citizens and help mitigate the causes leading to the need for pro bono representation.

Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. In the nature of law practice, however, conflicting responsibilities are encountered. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of the Rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a self-regulated profession.

The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional

Conduct, when properly applied, serve to define that relationship.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

## 0.2 Scope

The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the rules in which the lawyer has professional discretion. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other rules define the nature of relationships between the lawyer and others. The rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the comments use the term "should." Comments do not add obligations to the rules but provide guidance for practicing in compliance with the rules.

The rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. Compliance with the rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The rules simply provide a framework for the ethical practice of law.

Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these rules determine whether a client-lawyer relationship exists. Most of the duties

flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 4, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters ordinarily reposed in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. They also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so. These rules do not abrogate any such authority.

Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. The rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

Violation of a rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule. Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers, or the extra-disciplinary consequences of violating such a duty.

Moreover, these rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege. Those privileges were developed to promote compliance with law and fairness in litigation. In reliance on the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure. The attorney-client privilege is that of the client and not of the lawyer. The fact that in exceptional situations the lawyer under the rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges.

The lawyer's exercise of discretion not to disclose information should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure.

The comment accompanying each rule explains and illustrates the meaning and purpose of the rule. The preamble and this note on scope provide general orientation. The comments are intended as guides to interpretation, but the text of each rule is authoritative.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### 0.3 Definitions

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Firm" or "law firm" denotes a lawyer or lawyers in a private firm or professional corporation, lawyers employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization.

(c) "Fraud" or "fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

(d) "Full disclosure" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

(e) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(f) "Partner" denotes a member of a partnership or a shareholder in a law firm organized as a professional corporation.

(g) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(h) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(i) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(j) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### Case Notes

**Violation Not Civil Liability *Per Se*.** - Although a violation of a Rule of Professional Conduct does not constitute civil liability *per se*, the rules are some evidence of an attorney's duty to his client. *Booher v. Frue*, 98 N.C. App. 570, 394 S.E.2d 816, cert. denied, 327 N.C. 426, 395 S.E.2d 674 (1990).

## CANON I

### A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession

#### Rule 1.1 Bar Admission and Disciplinary Matters

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 4 of this chapter.

#### Comment

The duty imposed by this rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. This rule also requires affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware. It should also be noted that G.S. 84-28(b)(3) defines failure to answer a formal inquiry of the North Carolina State Bar as misconduct for which discipline is appropriate.

This rule is subject to the provisions of the Fifth Amendment of the United States Constitution and corresponding provisions of the North

Carolina Constitution. A person relying on such a provision in response to a question, however, should do so openly and not use the right of non-disclosure as a justification for failure to comply with this rule.

A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**Cross References** - See DR1-101, and Model Rule 8.1.

**Editor's Note** - Rule 1.1 is virtually identical to Model Rule 8.1 and is similar to former DR1-101. DR1-101 did not address information given in connection with disciplinary matters.

#### Disciplinary Hearing Notes

Among other things, the attorney made false statements to the State Bar's Grievance Committee during a reciprocal disciplinary hearing. Disbarred. 91 DHC 13.

Attorney failed to respond to the State Bar regarding a grievance filed against him. Sixty-day suspension, stayed for thirty days. 93 DHC 6.

Among other things, attorney failed to respond to 12th Judicial District Bar's Grievance Committee regarding four grievances filed against him and misrepresented to committee chair that he had responded in two grievances. Five-year suspension, one year stayed upon certain conditions. 93 DHC 22 and 94 DHC 2.

Among other things, attorney knowingly made false statements of material fact on his application for admission to the State Bar. Disbarred 93 DHC 33.

## Rule 1.2 Misconduct

It is professional misconduct for a lawyer to

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

### Comment

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation and professional unfitness.

Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of an attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, or guardian; agent, officer, director, or manager of a corporation or other organization.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**Cross References** - See DR1-102 and DR9-101(C), and Model Rule 8.4.

**Editor's Note** - Rule 1.2 is identical to Model Rule 8.4 and contains elements of former DR1-102 and DR9-101(C). There was no direct counterpart to Rule 1.2(f) in the Code of Professional Responsibility. Concerning amnesty for illicit drug use, see Article IX, Section 30 of the Rules and Regulations of the North Carolina State Bar.

### Case Notes

**Conversion of Client's Check.** - An attorney's act of forging a client's endorsement on an insurance check received by the attorney and converting the check to personal use constituted conduct involving moral turpitude. *North Carolina State Bar v. Whitted*, 82 N.C. App. 531, 347 S.E.2d 60 (1986), *aff'd*, 319 N.C. 398, 354 S.E.2d 501 (1987).

**Intentionally encouraging the concealment of material facts relevant to the identity of the driver in a driving under the influence prosecution is prejudicial to the administration of justice.** Such conduct raises serious doubts as to the attorney's desire to bring about a just result in such a prosecution and adversely reflects on the attorney's fitness to practice law. *North Carolina State Bar v. Graves*, 50 N.C. App. 450, 274 S.E.2d 396 (1981).

**Misrepresentation as to Opposing Party's Whereabouts.** - An attorney clearly engaged in conduct which involved fraud, dishonesty, deceit and misrepresentation when, in a divorce action, she failed to inform the court of a letter which contained the opposing party's return address, while at the same time presenting to the court an affidavit she had drafted in which her client swore that her husband's whereabouts were unknown

and could not with due diligence be ascertained. *North Carolina State Bar v. Wilson*, 74 N.C. App. 777, 330 S.E.2d 280 (1985).

**Misappropriation of Funds.** - The attorney misappropriated client funds in violation of Rule 1.2(b) of the Rules of Professional Conduct. It was no defense that the attorney intended at all times to return the funds and in fact did so. Evidence sufficient to support a charge of embezzlement also constitutes conduct involving dishonesty in violation of Rule 1.2(c) of the Rules of Professional Conduct. *North Carolina State Bar v. Mulligan*, 101 N.C. App. 524, 400 S.E.2d 123 (1991).

**Letter to Attorney Representing Former Clients.** - Findings by Disciplinary Hearing Commission did not support the Commission's conclusion that the defendant-attorney had engaged in conduct prejudicial to the administration of justice by writing a letter to the attorney representing the defendant-attorney's former clients where the Commission's order did not state whether the letter constituted a threat, the nature of the threat, if any, and how the conduct was prejudicial to the administration of justice. *North Carolina State Bar v. Beaman*, 100 N.C. App. 677, 398 S.E.2d 68 (1990).

Cited in *North Carolina State Bar v. Nelson*, 107 N.C. App. 543, 421 S.E.2d 163 (1992).

### Disciplinary Hearing Notes

The attorney signed someone else's name to a guaranty agreement and falsely represented that the signature was authentic in order to obtain funds for his personal benefit. The attorney also instructed his wife, whose notary certificate had been revoked, to falsely witness and represent the signature to induce a bank to make funds available to the attorney. One-year suspension. 82 DHC 1.

The attorney was convicted of conspiracy to conduct his judgeship through a pattern of racketeering activity by accepting bribes, and of facilitating an interstate phone call with the intent to carry on the unlawful activity of gambling. Disbarred. 85 DHC 4.

The attorney failed to perfect an appeal for his client and instead filed a paper writing which purported to dismiss his client's appeal without the client's knowledge or consent and against the client's well-known wishes. Public censure. 82 DHC 12.

The attorney, while involved in a series of real estate transactions which required the defendant to deposit funds in a trust account, allowed the trust account balance to fall below the amount necessary to preserve the identity of his client's funds. The attorney used funds of one client to satisfy the obligations of another client and used clients' trust funds to satisfy his personal obligations. Disbarred. 84 DHC 5.

The attorney endorsed a client's medical payment draft without the client's authorization, knowledge or consent, deposited the funds in his personal account and converted the funds. Disbarred. 84 DHC 4.

The attorney failed to file an appeal on his client's behalf and later, in a letter to the State Bar concerning the matter, made false statements concerning the trial and his neglect in failing to file the record of appeal. Ninety-day suspension. 82 DHC 3.

The attorney agreed to undertake the task of obtaining access to his client's landlocked real property. The attorney failed to initiate any legal action on behalf of his client but delivered to the client a document which purported to be an Order of the Superior Court dismissing a petition for a cartway. The document, purportedly signed by a judge, and bearing the seal and signature of an assistant clerk, was totally fraudulent. One-year suspension. 81 DHC 1.

The attorney pled guilty to the crime of embracery arising from an illegal contact with a juror in a pending case. Three-year suspension. 78 DHC 5.

The attorney was appointed by the court to represent an indigent criminal defendant. After the case was concluded, he sought and accepted payment from the State without disclosing to the court that he had been previously paid by the client's father. Public censure. 84 DHC 8.

Among other things, the attorney knowingly used perjured testimony in an attempt to receive a set-off for federal estate taxes due and perpetrated a fraud upon a Florida court by false testimony. Disbarred. 81 DHC 2.

Through a bank error, the attorney was left with \$14,000 in his trust account following a loan closing to which he was not entitled. The attorney made no attempt to correct the error and used \$10,660 for personal obligations. After realizing the seriousness of his actions, attorney took out a personal loan and repaid the funds to the rightful owner. One-year suspension. 84 DHC 11.

The attorney took the LSAT and exchanged answers with another person in order to credit the other person with the attorney's high LSAT score. One-year suspension. 83 DHC 1.

The attorney was convicted of conspiracy to manufacture, distribute and possess amphetamines. Disbarred. 77 DHC 11.

The attorney used false statements in reports to banks in order to influence them to grant him loans. Two-year suspension. 77 DHC 9.

The attorney was convicted in federal court of conspiracy to willfully misapply for his own use and benefit monies, funds and credits of a financial institution with intent to injure and defraud. Two-year suspension. 80 DHC 1.

The attorney was found guilty of receiving stolen goods. Disbarred. 78 DHC 4.

The attorney advised a defendant in a drug case, who was already represented by another attorney, that if the defendant hired the first attorney, the defendant would serve no active time. The attorney suggested that he could bring about the deal owing to his friendship with the trial judge and an SBI official. The attorney also attempted *ex parte* communications with the judge about his client's sentencing and asked a law enforcement officer to state falsely that the defendant had rendered substantial assistance to the sheriff's department. Disbarred. 89 DHC 30.

The attorney asked another attorney to sign a title opinion and other closing documents indicating that a prior loan owed by the first attorney would be paid off, then failed to pay off the loan. The attorney also obtained credit at a bank based upon a deposit of a \$10,000 check which the attorney knew or should have known was worthless. Two-year suspension, stayed for three years on certain conditions, including restitution to banks. 90 DHC 20.

The attorney prepared a codicil to her father's will when she knew or should have known that he lacked mental capacity to execute the codicil, thereby engaging in conduct prejudicial to the administration of justice and which adversely reflected upon her fitness to practice law, in violation of former DR1-102(A)(5) and DR1-102(A)(6). Public reprimand. 89 DHC 21.

The attorney attempted to induce a witness who had testified against the attorney in a prior disciplinary hearing to sign a false statement recanting his testimony in the prior hearing. Disbarred. 89 DHC 15.

The attorney misappropriated funds belonging to an estate. Although the embezzlement was motivated in part by the attorney's addiction to cocaine, the attorney's drug use did not prevent him from recognizing the nature of his conduct and therefore did not mitigate his misconduct. Disbarred. 90 DHC 21.

The attorney had two clients sign deeds, rather than a deed of trust, to secure fees owed to him by the clients. One-year suspension, stayed one year upon certain conditions. 89 DHC 23.

The attorney made false statements to the State Bar's Grievance Committee during a reciprocal disciplinary hearing, lied to the State Bar's investigator regarding those false statements, and was untruthful during the disciplinary hearing. Disbarred. 91 DHC 13.

The attorney lied to the grievance committee, lied to the State Bar's investigator and gave untruthful testimony in a disciplinary hearing. Disbarred. 91 DHC 13.

The attorney charged an illegal rate of interest on a loan and lied to the debtor's attorney regarding balances owed on the loan. Two-year suspension. 91 DHC 20.

Among other things, the attorney failed to file income tax returns between 1985 and 1987. Five-year suspension, stayed on certain conditions. 91 DHC 22.

The attorney failed to file state income tax returns in 1988 and 1989. Five-year suspension, stayed on certain conditions. 91 DHC 23.

The attorney misrepresented to an administrative law judge and a state agency that he had been advised by the former chief administrative law judge to take certain actions on behalf of his client when, in fact, the attorney had not discussed that client's case with the former judge. Censure. 92 DHC 3.

Among other things, the attorney submitted false information on a fee petition in two social security cases. One-year suspension, stayed on certain conditions. 92 DHC 5.

An assistant district attorney engaged in conduct prejudicial to the administration of justice by failing to reveal certain aspects of a plea agreement to the court. Admonition. 92 DHC 18.

The attorney represented the seller in commercial real estate transaction while he was also general partner of the buyer. The attorney also improperly directed a \$165,000 credit to the buyer and a corresponding debit to the seller at the closing of the transaction without the seller's consent and paid himself \$150,000 in attorneys' fees from funds held in escrow, in violation of the escrow agreement. Three-year suspension. 92 DHC 16.

The attorney improperly retained interest earned on client funds and also retained at least \$4,671.23 in overpayments on title insurance premiums collected from various clients. Three-year suspension, stayed 30 months. 92 DHC 19.

Attorney wrote checks to himself totaling \$13,000 from an estate for commissions without approval of the clerk and without performing the normal duties of a personal representative. Disbarred. 93 DHC 2.

Among other things, attorney falsely indicated on clients' ledger cards that monies had been received and fees paid on their behalf. One-year suspension, stayed for three years upon certain conditions. 93 DHC 20.

Attorney forged two attorneys' names to title opinions, temporarily misappropriated client funds, misappropriated fees belonging to her former law firm, made material misrepresentations on a resume given to her former law firm, and attempted to persuade a witness to change prior truthful statements the witness had given the State Bar. Disbarred. 93 DHC 29.

Attorney engaged in a check writing scheme involving writing checks from his trust account, business account, and personal account to cover worthless checks and removed funds from his trust account without the client's consent. Three-year suspension, stayed 33 months upon certain conditions. 93 DHC 31

### Ethics Opinion Notes

**CPR 110.** An attorney may not advise a client to seek Dominican divorce knowing that the client will return immediately to North Carolina and continue residence.

**CPR 168.** An attorney may file personal bankruptcy.

**CPR 188.** An attorney may not draw deeds or other legal instruments based on land surveys made by unregistered land surveyors.

**CPR 342.** An attorney should not close a loan where the transaction is conditioned by the lender upon the placement of title insurance with a particular company.

**CPR 369.** An attorney may close a loan if the lender merely suggests rather than requires the placement of title insurance with a particular company.

**RPC 127.** An attorney may not deliberately release settlement proceeds which were conditionally delivered without satisfying all conditions precedent.

**RPC 136.** An attorney may notarize documents which are to be used in legal proceedings in which the attorney appears.

**RPC 143.** A lawyer who represents or has represented a member of the city council may represent another client before the council.

**RPC 152.** The prosecutor and the defense attorney must see that all material terms of a negotiated plea are disclosed in response to direct questions when the plea is entered in open court.

**RPC 159.** An attorney may not participate in the resolution of a civil dispute involving allegations against a psychotherapist of sexual involvement with a patient if the settlement is conditioned upon the agreement of the complaining party not to report the misconduct to the appropriate licensing board.

**RPC 162.** A lawyer may not communicate with the opposing party's nonparty treating physician about the physician's treatment of the opposing party unless the opposing party consents.

**RPC 171.** A lawyer may tape record a conversation with an opposing lawyer without disclosure to the opposing lawyer.

**RPC 180.** A lawyer may not passively listen while the opposing party's nonparty treating physician comments on his or her treatment of the opposing party unless the opposing party consents.

**RPC 192.** A lawyer may not listen to an illegal tape recording made by his client nor may he use the information on the illegal tape recording to advance his client's case.

### **Rule 1.3 Reporting Professional Misconduct**

(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the North Carolina State Bar or other appropriate authority.

(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This rule does not require disclosure of information otherwise protected by Rule 4 of this chapter.

#### **Comment**

Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a substantial violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

A report about misconduct is not required where it would involve violation of Rule 4 of this chapter. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interest.

If a lawyer were obliged to report every violation of the rules, the failure to report any violation would itself be a professional offense. Such a requirement existed before but proved to be unenforceable. This rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this rule. The term "substantial" refers to the seriousness of the alleged offense and not the quantum of evidence of which the lawyer is aware. Similar considerations apply to the reporting of judicial misconduct.

The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

#### **Case Notes**

**Knowledge of a Clear Violation.** - An allegation that an attorney and a district court judge knew that the plaintiff's attorney failed to perfect an appeal did not support an inference that defendants had "knowledge of a clear violation of DR1-102" which should have been reported to the State Bar, since there are many legitimate reasons why an appeal may not be perfected. *Williams v. Council of North Carolina State Bar*, 46 N.C. App. 824, 266 S.E.2d 391, cert. denied, 301 N.C. 106 (1980).

#### **Disciplinary Hearing Notes**

The attorney had unprivileged knowledge that his law partner had misappropriated client funds, but failed to report the misconduct to the Bar or other appropriate authority. Reprimand. 89 DHC 5.

#### **Ethics Opinion Notes**

**CPR 342.** An attorney is not obligated to report violations of the law committed by nonlawyers.

**RPC 17.** An attorney who acquires knowledge of apparent misconduct must report the matter to the State Bar.

**RPC 84.** An attorney may not condition settlement of a civil dispute on an agreement not to report lawyer misconduct.

**RPC 127.** An attorney must report information to the State Bar concerning another attorney's disbursement of conditionally delivered settlement proceeds without satisfying all conditions precedent if the disbursement was made in knowing disregard of such conditions and if such information is not confidential.

## **CANON II**

### **A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available**

#### **Rule 2.1 Communications Concerning a Lawyer's Services**

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or

(c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

## Comment

This rule governs all communications about a lawyer's services, including advertising permitted by Rule 2.2. of this chapter. Whatever means are used to make known a lawyer's services, statements about them should be truthful. The prohibition in paragraph (2)(b) of statements that may create "unjustified expectations" would ordinarily preclude advertisements about results obtained on behalf of clients, such as the amounts of damage awards or the lawyer's record in obtaining favorable verdicts and advertisements containing client endorsements. Such information may create the unjustified expectation that similar results can be obtained for others without reference to specific factual and legal circumstances.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**Cross References** - See DR2-101(A) and Model Rule 7.1.

**Editor's Note** - Rule 2.1 and Model Rule 7.1 are identical. Rule 2.1 differs from former DR2-101 in that the new rule speaks only to the lawyer or the lawyer's services and does not mention others associated with him, such as partners or associates. Rule 2.1 also defines false or misleading communications and DR2-101 did not give such guidance.

## Ethics Opinion Notes

**RPC 5.** An attorney holding a Juris Doctor degree may not on that basis refer to himself or herself as a "Doctor."

**RPC 135.** An attorney may not participate in a private lawyer referral service which advertises that its participants are "the best."

**RPC 161.** A television commercial for legal services which fails to mention that bankruptcy is the debt relief described in the commercial and describes results obtained for others is misleading.

**RPC 164.** Television commercials for an attorney's services that depict fictional clients and cases are misleading and prohibited.

## Rule 2.2 Advertising

(a) Subject to the requirements of Rule 2.1 of this chapter, a lawyer may advertise services through public media, such as telephone directories, legal directories, newspapers or other periodicals, outdoor advertising, radio or television, or through written communications not involving solicitation as defined in Rule 2.4 of this chapter.

(b) A copy or recording of an advertisement or written communication shall be kept for two years after its last dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by this rule and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization. A lawyer may participate in and share the cost of a private lawyer referral service so long as the following conditions are met:

(1) only compensation for administrative service may be paid to a lawyer or layman incident to the operation of the private referral service, which compensation shall be reasonable in amount;

(2) all advertisements shall be paid for by the participants in the service;

(3) no profit in specie or kind may be received other than from legal fees earned from representation of referred clients;

(4) employees of the referral service may not initiate contact with prospective clients; and

(5) all advertisements shall

(A) state clearly and conspicuously that the referral service is privately operated, which statement shall be given the same prominence as the name of the referral service;

(B) state that a list of all participating lawyers will be mailed free of charge to members of the public upon request and state further where such information may be obtained; and

(C) indicate that the service is not operated or endorsed by any public agency or any disinterested organization.

(d) Any lawyer participating in a private lawyer referral service shall be professionally responsible for its operation.

(e) Any communication made pursuant to this rule other than that of a lawyer referral service as described in subsection (c) above shall include the name of at least one lawyer or law firm responsible for its content.

## Comment

To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services in combination with the lawyer's own rights under the First Amendment ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading, overreaching, deceptive, coercive, intimidating, or vexatious.

This rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

This rule does not prohibit communications authorized by law, such as notices to members of a class in class action litigation.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**Cross-References.** - See DR2-101(B) and DR2-103, and Model Rule 7.2.

**Editor's Notes.** - Rule 2.2 differs from Model Rule 7.2 in that Rule 2.2 includes specific conditions under which a lawyer may participate in a private lawyer referral service. In further contrast to the Model Rule, Rule 2.2 provides that any communication made pursuant to the Rule, other than that of a private lawyer referral service, must contain the name of at least one lawyer or law firm responsible for its content. The Model Rule requires inclusion of a lawyer's name and would not be satisfied by mere firm identification.

**Legal Periodicals.** - For note discussing commercial speech and disciplinary rules preventing attorney advertising and solicitation, see 65 N.C.L. Rev. 170 (1986).

For note discussing the liberalization of attorney commercial speech rights, in light of *Zauderer v. Office of Disciplinary Counsel*, 105 S. Ct. 2265 (1985), see 21 Wake Forest L. Rev. 1019 (1986).

For note on attorney solicitation by targeted, direct-mail advertisements, see 24 Wake Forest L. Rev. 481 (1989).

## Disciplinary Hearing Notes

Attorney engaged in in-person solicitation by participating in a lawyer referral service whose employees engaged in in-person and live telephone solicitation. Attorney also gave value to a person for recommending his services by paying the referral service \$100 for each client referred who he agreed to represent. Reprimand. 93 DHC 13.

## Ethics Opinion Notes

**CPR 39.** A lawyer may participate in a call-in radio program and answer legal questions.

**CPR 40.** It would be unethical for lawyers to offer free legal services to employees of a savings and loan association to get title work.

**CPR 58.** An attorney may write and publish pamphlets of a legal nature and offer them for sale to the public.

**CPR 116.** An attorney may write legal articles for publication in business journals and be identified.

**CPR 336.** An attorney may advertise that he or she is also in the securities business and the insurance business.

**CPR 359.** Attorneys may share the cost of advertising by means of a private lawyer referral service under certain conditions.

**RPC 10.** Attorney may affiliate with a private lawyer referral service administered by a for-profit business corporation so long as the corporation does not profit from the referrals.

**RPC 94.** A private lawyer referral service must have more than one participating lawyer and all participants must share in the cost of operating the referral service.

**RPC 115.** A lawyer may sponsor truthful legal information which is provided by telephone to members of the public.

**RPC 135.** An attorney may not participate in a private lawyer referral service unless all advertisements of the service state that a list of all participating lawyers will be mailed free of charge to members of the public upon request and indicate that the service is not operated or endorsed by any public agency or any disinterested organization.

**RPC 161.** A television commercial for legal services which fails to mention that bankruptcy is the debt relief described in the commercial and describes results obtained for others is misleading.

## Rule 2.3 Firm Names and Letterheads

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rules 2.1 or 2.2 of this chapter. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise false or misleading. Every trade name used by a law firm shall be registered with the North Carolina State Bar, and upon a determination by the council that such name is potentially misleading, a remedial disclaimer or an appropriate identification of the firm's composition or connection may be required. For purposes of this section, the use of the names of deceased former members of a firm shall not render the firm name a trade name.

(b) A law firm practicing in more than one jurisdiction may use the same name in each jurisdiction, but identification of its members and associates in any communication shall indicate the jurisdictional limitations of those not licensed to practice in North Carolina.

(c) A law firm maintaining offices only in North Carolina may not list any person not licensed to practice law in North Carolina as an attorney affiliated with the firm.

(d) The name of a lawyer holding a public office shall not be used in the name of the law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm, whether or not the lawyer is precluded from practicing by law.

(e) A lawyer shall not hold himself or herself out as practicing in a law firm unless the association is in fact a firm.

(f) No lawyer may maintain a permanent professional relationship with any lawyer not licensed to practice law in North Carolina unless law offices are maintained in North Carolina and in a state where such other lawyer is licensed and practices and a certificate of registration authoriz-

ing said professional relationship is first obtained from the secretary of the North Carolina State Bar.

## Comment

A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." Use of trade names in law practice is acceptable so long as they are not misleading and are otherwise in conformance with the rules and regulations of the State Bar.

As it is unlawful for a person trained as an attorney to practice law in North Carolina without a license from the state, it is misleading and improper for such a person to be listed in any firm communication, public or private, as having any continuing affiliation with the firm as a lawyer, unless he or she actively practices and maintains offices in another jurisdiction where he is licensed.

Nothing in these rules shall be construed to confer the right to practice law in North Carolina upon any lawyer not licensed to practice law in North Carolina.

With regard to paragraph (e), lawyers sharing office facilities who are not in fact partners may not denominate themselves as, for example, "Smith and Jones," for that title suggests partnership in the practice of law.

## Ethics Opinion Notes

**CPR 22.** Where father and son practice as Doe and Doe, son may, upon father's election to a judgeship, identify himself on his letterhead as Richard Doe, attorney at law-successor to Doe & Doe.

**CPR 69.** A lawyer may be a partner in more than one law firm.

**CPR 111.** A law firm which has a member taking temporary leave to work for the State may continue using the absent member's name in the firm name and on its letterhead.

**CPR 117.** A law firm in City X forming a partnership with Attorney in City Y may not use different names in the two cities.

**CPR 197.** It is permissible to cross out a partner's name when he becomes a judge without replacing the stationery on hand.

**CPR 211.** An attorney licensed in both North Carolina and South Carolina who has an office only in South Carolina and a partner licensed only in South Carolina may practice in North Carolina. His firm should use the same name in North Carolina as it uses in South Carolina and its letterhead should show the jurisdictional limitations of its lawyers.

**CPR 213.** A law firm may share offices with a common reception area with an accounting firm as long as separate telephones are maintained.

**CPR 234.** A law firm may operate a legal clinic.

**CPR 238.** An agreement between a North Carolina lawyer and a lawyer licensed in another state to list each other on their letterhead and to refer cases to each other is improper in the absence of a bona fide partnership.

**CPR 248.** The use of A and B as a firm name is improper when Attorney A employs Attorney B as an associate.

**CPR 256.** North Carolina firm may not use the name of an out-of-state firm from which it receives referrals where there is no bona fide interstate partnership.

**CPR 265.** Attorneys who share office but are not partners may not answer phone as A, B, and C attorneys, but may answer "Law Offices." If there is a true partnership, partners must use stationery with the firm letterhead.

**CPR 274.** It is possible for attorneys to share offices and still represent conflicting interests if they maintain separate telephones and have different secretaries.

**CPR 307.** An attorney who is also a real estate broker may so indicate on his letterhead. He may operate both businesses from same office.

**CPR 330.** Letterhead of attorneys in realty business may also show the designation, attorney at law.

**CPR 361.** A law firm may not list on its letterhead an attorney not yet licensed in North Carolina when the law firm has its sole office in North Carolina.

**CPR 371.** An attorney who is unlicensed in North Carolina and who limits his practice to federal tax law may not become a partner of law firm nor be listed on the firm's letterhead. He may be employed and paid a salary.

**RPC 5.** An attorney holding a Juris Doctor degree may not on that basis hold himself out as a "Doctor."

**RPC 25.** It is improper to list an unlicensed attorney on letterhead as "of counsel" or "consulting attorney."

**RPC 31.** A law firm may not list on its letterhead a "corresponding" attorney in another location.

**RPC 34.** An attorney licensed in North Carolina and another state who is semi-retired from a law firm in the other state can be "of counsel" to the North Carolina firm so long as he has a close, though not necessarily daily, association with North Carolina firm.

**RPC 68.** A firm with offices only in North Carolina may not properly submit biographical information for publication concerning attorneys in the firm who are not licensed in North Carolina.

**RPC 85.** An "of counsel" relationship may exist between lawyers practicing in different towns if the professional relationship is close, regular and personal and the designation is not otherwise false or misleading.

**RPC 126.** Nonlawyers may be listed as such on the letterhead of lawyers.

## **Rule 2.4 Direct Contact with Prospective Clients**

(a) A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

(b) A lawyer shall not solicit professional employment from a prospective client by written or recorded communication or by in-person or telephone contact even when not otherwise prohibited by paragraph (a) above, if

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress, harassment, compulsion, intimidation, or threats.

(c) Every written or recorded communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter, and with whom the lawyer has no family or prior professional relationship, shall include the words "This is an advertisement for legal services" on the outside envelope and at the beginning of the body of the written communication in print as large or larger than the lawyer's or law firm's name and at the beginning and ending of any recorded communication.

(d) Notwithstanding the prohibitions in paragraph (a) above, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer which uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan, so long as such contact does not involve coercion, duress, or harassment and is not false, deceptive, or misleading.

### **Comment**

There is a potential for abuse inherent in direct in-person or live telephone contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need

for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

This potential for abuse inherent in direct in-person or live telephone solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 2.2 of this chapter offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or autodialed make it possible for a prospective client to be informed about the need for legal services and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in-person or telephone persuasion that may overwhelm the client's judgment.

The use of general advertising and written and recorded communications to transmit information from lawyer to prospective client, rather than direct in-person or live telephone contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 2.2 of this chapter are permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 2.1 of this chapter. The contents of direct in-person or live telephone conversations between a lawyer and a prospective client can be disputed and are not subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

There is far less likelihood that a lawyer would engage in abusive practices against an individual with whom the lawyer has a family or prior professional relationship or where the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Consequently, the general prohibition in Rule 2.4(a) and the requirements of Rule 2.4(c) are not applicable in those situations.

But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 2.1 of this chapter, which involves coercion, duress, harassment, compulsion, intimidation or threats within the meaning of Rule 2.4(b)(2), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 2.4(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 2.2 of this chapter the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 2.4(b).

This rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries, or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 2.2 of this chapter.

The requirement in Rule 2.4(c) that certain communications be marked "This is an advertisement for legal services" does not apply to communi-

cations sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this rule.

Paragraph (d) of this rule would permit an attorney to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization referred to in paragraph (d) must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 2.1, 2.2 and 2.4 of this chapter. See Rule 1.2(a) of this chapter.

**History Note:** Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**Cross-References.** - See DR2-103 and Model Rule 2.3.

**Editor's Note.** - Rule 2.4 is essentially the same as Model Rule 7.3.

Solicitation by personal communication was formerly permitted by DR2-103(A) under circumstances not involving deceit or misrepresentation or the substantial potential for coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overpersuasion, overreaching or vexatious or harassing conduct, taking into account the physical, emotional or mental state of the person to whom the communication was directed.

Rule 2.4 was amended in May, 1989, to eliminate the prohibition of direct mail advertising to persons known to need legal services in particular matters in accordance with the decision of the United States Supreme Court in *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 108 S. Ct. 1916, 100 L. Ed. 2d 475 (1988)

## Case Notes

U.S. Const., Amend. I prohibits states from categorically prohibiting attorneys from soliciting legal business for pecuniary gain by sending truthful letters to potential clients known to face particular legal problems. *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 108 S. Ct. 1916, 100 L. Ed. 2d 475 (1988).

## Ethics Opinion Notes

**CPR 14.** A lawyer may not perform title examinations and legal work for a developer for free or for a substantially reduced fee as consideration for the developer's promise to recommend the lawyer to prospective purchasers and their lenders.

**CPR 24.** Withdrawing partners and remaining partners should agree to send clients a common announcement of the firm's dissolution so that the client may elect whom he wishes to handle his legal business.

**CPR 52.** It is proper to notify former clients of changes in the law that could affect their wills.

**CPR 104.** Attorneys may request lenders and title insurance companies to place them on approved lists.

**CPR 191.** It is improper for an attorney to belong to a "Tip Club" in which members agree to refer business to each other.

**CPR 258.** In response to a request, an attorney may submit a bid for legal work to the FHA.

**CPR 352.** It is not improper for an attorney to inform a client with a personal injury claim that the spouse may also have a claim and that the attorney is willing to handle the claim.

**RPC 6.** An attorney may not solicit employment by corporations. (Decided prior to 1989 amendment to Rule 2.4 permitting targeted direct mail advertising.)

**RPC 20.** An attorney may not use an intermediary to arrange meetings between prospective business clients and the attorney for the purpose of soliciting legal business, nor may an attorney make "cold calls" upon prospective business clients.

**RPC 36.** A law firm may hold a seminar concerning automobile accident claims for members of the public who are randomly selected for invitation or who receive invitations through bulk occupant mailing. (Decided prior to 1989 amendment to Rule 2.4 permitting targeted direct mail advertising.)

**RPC 57.** A lawyer may agree to be on a list of attorneys approved to handle all of a lender's title work.

**RPC 71.** An attorney may not accept legal employment by a prepaid legal service plan owned by the attorney's wife or another member of the attorney's immediate family, if the plan will market its services by in-person solicitation.

**RPC 98.** The opinion construes the term "professional relationship" and explores the circumstances under which solicitation of persons or organizations with whom a lawyer has had business and professional dealings is permissible. Targeted print advertising is also discussed.

**RPC 115.** A lawyer may sponsor truthful legal information which is provided by telephone to members of the public.

**RPC 146.** A law firm can invite existing clients to a social function hosted by the law firm prior to a bid letting for contracts and may host a social function for nonclients who attend the bid letting as long as the law firm does not solicit employment from the nonclients.

**RPC 161.** The recorded message which is heard when a television viewer dials a telephone number broadcast during a television advertisement for legal services must include the statement "this is an advertisement for legal services" at the beginning and ending of the recorded message.

**RPC 200.** The lawyers remaining with a firm may contact by phone or in person clients whose legal matters were handled exclusively by a lawyer who has left the firm.

## Rule 2.5 Specialization

(a) A lawyer may not communicate that the lawyer is a certified specialist or certified in a field of practice except as provided in this rule.

(b) A lawyer may communicate that the lawyer is certified as a specialist or certified in a field of practice when the communication states the name of the certifying organization and is not false or misleading, and

(1) the certification is granted by the North Carolina State Bar; or

(2) the certification is granted by an organization which has been approved by the North Carolina State Bar; or

(3) the certification is granted by an organization which has been approved by the American Bar Association under procedures and criteria which have been approved by the American Bar Association and which have been endorsed by the North Carolina State Bar.

## Comment

The use of the word "specialize" in any of its variant forms connotes to the public a particular expertise often subject to recognition by the state. Indeed, the North Carolina State Bar has instituted programs providing for official certification of specialists in certain areas of practice. In order to avoid any confusion, the rule requires that any representation of specialty be not only true, but be accompanied by a disclaimer of state certification if such is not the case. A lawyer may, however, describe his practice without using the term "specialize" in any manner which is truthful and not misleading and forego use of a disclaimer. He may, for instance, indicate a "concentration" or an "interest" or a "limitation" without disclaimer.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**Cross-References.** - See DR2-104 and Model Rule 7.4.

**Editor's Notes.** - Rule 2.5 is essentially the same as former DR2-104. Model Rule 7.4 specifically allows an attorney to state that he is a specialist in patent practice and admiralty law. Rule 2.5 does not allow these or other designations as a specialist without disclaimer unless the lawyer has been certified as a specialist by the State Bar.

### Case Notes

U.S. Const., Amend. I prohibits states from categorically prohibiting lawyers from advertising their certification as specialists by bona fide private organizations. Lesser restrictions are available to eliminate any potential confusion caused by such advertisements. *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 110 S. Ct. 2281, 110 L. Ed. 2d 83 (1990).

### Ethics Opinion Notes

**RPC 43.** An attorney who has been certified as a specialist by the Board of Legal Specialization may so indicate in an advertisement in any way that is not false, deceptive or misleading.

## Rule 2.6 Fees for Legal Services

(a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(b) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence experienced in the area of law involved would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
  - (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
  - (3) the fee customarily charged in the locality for similar legal services;
  - (4) the amount involved and the results obtained;
  - (5) the time limitations imposed by the client or by the circumstances;
  - (6) the nature and length of the professional relationship with the client;
  - (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
  - (8) whether the fee is fixed or contingent.
- (c) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case or for representing a party in a civil case in which such a fee is prohibited by law or otherwise.

(d) A division of fee between lawyers who are not in the same firm may be made only if

- (1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;
  - (2) the client is advised of and does not object to the participation of all the lawyers involved; and
  - (3) the total fee is reasonable.
- (e) Any lawyer having a dispute with a client regarding a fee for legal services must

- (1) make reasonable efforts to advise his or her client of the existence of the North Carolina State Bar's program of nonbinding fee arbitration at least 30 days prior to initiating legal proceedings to collect the disputed fee; and

- (2) participate in good faith in nonbinding arbitration of the fee dispute if such is subject to the jurisdiction of any duly constituted fee arbitration committee of the North Carolina State Bar or any of its constituent district bars if the client submits a proper request for fee arbitration.

### Comment

When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding and is desirable.

A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 2.8(a)(3) of this chapter. This does not apply when the advance payment is a true retainer to reserve services rather than an advance to secure the payment of fees yet to be earned. A lawyer may accept property in payment for services, provided this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 5.3(a) of this chapter. However a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.

Once a fee contract has been reached between attorney and client, the attorney has an ethical obligation to fulfill the contract and represent his client's best interests regardless of whether he or she has struck an unfavorable bargain. An attorney may seek to renegotiate his or her fee agreement in light of changed circumstances or for other good cause, but he or she may not abandon or threaten to abandon the client to cut losses or to coerce an additional or higher fee. Any fee contract made or remade during the existence of the attorney-client relationship must be reasonable and freely and fairly made by the client having full knowledge of all material circumstances incident to the agreement. If a dispute later arises concerning the fee, the burden of proving reasonableness and fairness will be upon the lawyer. All fees, including contingent fees, should be reasonable and not excessive as to percentage or amount.

A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well. Paragraph (d) permits the lawyers to divide a fee on either the basis of the proportion of services they render or by agreement between the participating lawyers if all assume responsibility for the representation as a whole and the client is advised and does not object. It does not require disclosure to the client of the share that each lawyer is to receive.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**Cross-References.** - See DR2-105 and DR2-106, and Model Rule 1.5.

**Editor's Notes.** - Rules 2.6(a) and (b) are identical to DR2-105(A) and (B).

Rule 2.6 does not contain any language requiring the lawyer to communicate the basis or rate of the fee at the onset of representation as does Model Rule 1.5(b). However, this issue is addressed in the accompanying comment. Rule 2.6 also differs from the Model Rule in that it contains no requirement that contingent fee agreements be written. Written contracts in such cases are required by Model Rule 1.5(c).

Rule 2.6(c) and Model Rule 1.5(d) both prohibit contingent fees in criminal cases as did DR2-105(C). In civil cases, the Model Rule specifically prohibits such fees only in domestic matters, while Rule 2.6(c) condemns contingent fee contracts whenever they are prohibited by law. The Code did not expressly condemn contingent fee agreements in any particular areas of civil law.

Rule 2.6(d) and Model Rule 1.5(e) are identical. Rule 2.6(d) differs from former DR2-106(A) in that it does not require that lawyers participating in the division of a fee be compensated only in proportion to their services, but rather, permits division on any basis agreed to by the participating lawyers if each assumes joint responsibility for the representation and if the client consents in writing.

For comment on contingent fees in domestic relations actions, see 62 N.C.L. Rev. 381 (1984).

For note, "The Contingent Fee Contract in Domestic Relations Cases," see 7 Campbell L. Rev. 427 (1985).

For article, "Nonrefundable Retainers Revisited," see 72 N.C.L. Rev. 1 (1993).

### Case Notes

**Entitlement to Reasonable Value of Services.** - An attorney discharged by his client is entitled to recover the reasonable value of the services he has already rendered. The reasonable value of such services is determined by the totality of the circumstances of each case. *O'Brien v. Plumides*, 79 N.C. App. 159, 339 S.E.2d 54, cert. dismissed, 318 N.C. 409, 348 S.E.2d 805 (1986).

Plaintiff attorney brought an action to recover a contingent fee in a personal injury case where the client had discharged the attorney after he had begun working on the client's case. The Court held that the attorney was entitled to the reasonable value of the services rendered before his discharge by the client. *Covington v. Rhodes*, 38 N.C. App. 61, 247 S.E.2d 305 (1978), disc. rev. denied, 296 N.C. 410, 251 S.E.2d 468 (1979).

**Determination of Reasonable Fees.** - Reasonable counsel fees may be determined in part by the amount of the verdict obtained in a condemnation proceeding in light of proposals made to the property owner prior to his employment of an attorney. The results obtained by an attorney are a legitimate consideration in determining the amount of his fee. *Redevelopment Comm'n v. Hyder*, 20 N.C. App. 241, 201 S.E.2d 236 (1973).

**Contingent Fee Contracts in Domestic Cases.** - A contingent fee contract for legal services in a divorce, alimony or child support proceeding is void. *Thompson v. Thompson*, 70 N.C. App. 147, 319 S.E.2d 315 (1984), rev'd on other grounds, 313 N.C. 313, 328 S.E.2d 288 (1985).

**Contingent Fee Contracts in Obtaining Equitable Distribution.** - A contingent fee contract for an attorney's services in obtaining an equitable distribution is valid if the contract does not compensate the attorney for securing a divorce for the same client. *In Re Cooper*, 81 N.C. App. 27, 344 S.E.2d 27 (1986).

**Contingent Contract Held Void.** - Fee contract which provided that the attorney would receive 20% of the total amount recovered in an action for alimony and child support was void as against public policy. *Townsend v. Harris*, 102 N.C. App. 131, 401 S.E.2d 132, appeal dismissed, 328 N.C. 734, 404 S.E.2d 877, cert. denied, —U.S.—, 112 S. Ct. 329 116 L.Ed.2d 270 (1991).

### Disciplinary Hearing Notes

Attorney who was administrator of estate authorized payment of a fee from estate account to attorney's partners for legal services rendered to the estate without first obtaining a court order or approval of all of the heirs of the estate. Public censure. 89 DHC 21.

### Ethics Opinion Notes

**CPR 11.** An attorney may accept an interest in land as a fee for title examination and representation in an action to clear title.

**CPR 37.** An attorney may charge interest on delinquent accounts.

**CPR 47.** A Legal Aid Society may receive fees awarded by the court.

**CPR 54.** An attorney may submit a fee schedule to a savings and loan association.

**CPR 79.** An attorney serving as a trustee in bankruptcy or as a fiduciary in state proceedings may receive legal fees for acting as his own attorney.

**CPR 129.** An attorney may accept payment of legal fees by credit card.

**CPR 217.** An attorney representing an indigent may not receive compensation from any source other than the court.

**CPR 250.** An attorney charging a flat fee may have his client sign a confession of judgment and file it with the clerk of court.

**CPR 312.** Contingent fees may be charged in equitable distribution cases.

**CPR 375.** An attorney may agree for his fee to be the interest earned on an amount escrowed at a loan closing to guarantee completion of repairs.

**RPC 2.** Contingent fees may be charged to collect liquidated amounts of past due child support.

**RPC 7.** An attorney may employ a collection agency to collect a past due fee so long as the fee agreement out of which the account arose was permitted by law and by the Rules of Professional Conduct; the lawyer, at the time underlying the fee agreement was made, did not believe, and had no reason to believe, that he was undertaking to represent a client who was unable to afford his services; the legal services giving rise to the fee out of which the account arose have been completed so that the lawyer has no further responsibilities as the client's attorney; there is no genuine dispute between the lawyer and the client about the existence, amount, or delinquent status of the indebtedness; and the lawyer does not believe, and has no reason to believe, that the agency which he employs will use any illegal means to collect the account.

**RPC 35.** An attorney may not charge an elevated contingent fee to collect "med-pay" or any other claim with respect to which liability is clear and there is no real dispute as to the amount due.

**RPC 50.** A lawyer may charge nonrefundable retainers that are reasonable in amount.

**RPC 52.** Opinion describes circumstances under which a lawyer who has been appointed to represent an indigent person may accept payment directly from the client.

**RPC 107.** A lawyer and her client may agree to employ alternative dispute resolution procedures to resolve disputes between themselves.

**RPC 106.** Opinion discusses circumstances under which a refund of a prepaid fee is required.

**RPC 141.** An attorney's contingent fee in a case resolved by a structured settlement should, if paid in a lump sum, be calculated in terms of the settlement's present value.

**RPC 148.** A lawyer may not split a fee with another lawyer who does not practice in her law firm unless the division is based upon the work done by each lawyer or the client consents in writing, the fee is reasonable, and responsibility is joint.

**RPC 149.** An arrangement in a criminal case whereby a lawyer is to be paid whatever remains from a lump sum after any fines or costs are deducted is unethical because the amount of the fee is contingent.

**RPC 155.** An attorney may charge a contingent fee to collect delinquent child support.

**RPC 158.** A sum of money paid to a lawyer in advance to secure payment of a fee which is yet to be earned and to which the lawyer is not entitled must be deposited in the lawyer's trust account.

**RPC 166.** A lawyer may seek to renegotiate a fee agreement with a client provided he does not abandon or threaten to abandon his client in order to cut his losses or to coerce a higher fee.

**RPC 174.** A legal fee for the collection of "med-pay" which is based upon the amount collected is unreasonable.

**RPC 190.** A lawyer who has agreed to bill a client on the basis of hours expended may not bill the client on the same basis for reused work product.

**RPC 196.** A lawyer may not charge a clearly excessive fee for legal representation even if the legal fee may be recovered from an opposing party.

## Rule 2.7 Agreements Restricting the Practice of a Lawyer

(a) A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of the relationship created by the agreement, except as a condition to payment of retirement benefits.

(b) In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his or her right to practice law.

### Comment

An agreement restricting the right of partners or associates to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

### Ethics Opinion Notes

**RPC 13.** A retirement agreement may require a lawyer to accept inactive status as a member of the State Bar as a condition of payment of retirement benefits.

**RPC 179.** A lawyer may not offer or enter into a settlement agreement that contains a provision barring the lawyer who represents the settling party from representing other claimants against the opposing party.

## Rule 2.8 Withdrawal from Employment

(a) In General -

(1) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) In any event, a lawyer shall not withdraw from employment until he or she has taken reasonable steps to avoid foreseeable prejudice to the rights of his or her client, including giving due notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

(3) A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned.

(b) **Mandatory Withdrawal** - A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment if

(1) the lawyer knows or it is obvious that his or her client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken for him or her, merely for the purpose of harassing or maliciously injuring any person;

(2) the lawyer knows or it is obvious that his or her continued employment will result in violation of a rule of professional conduct;

(3) the lawyer's mental or physical condition renders it unreasonably difficult for him or her to carry out the employment effectively;

(4) the lawyer is discharged by the client.

(c) **Permissive Withdrawal** - If Rule 2.8(b) above is not applicable, a lawyer may request permission to withdraw in matters pending before a tribunal and may withdraw in other matters only if

(1) the client

(A) insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law;

(B) personally seeks to pursue an illegal course of conduct;

(C) insists that the lawyer pursue a course of conduct that is illegal, repugnant or imprudent or that is prohibited under the Rules of Professional Conduct;

(D) by other conduct renders it unreasonably difficult for the lawyer to carry out his or her employment effectively;

(E) insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited under the Rules of Professional Conduct;

(F) deliberately disregards an agreement or obligation to the lawyer as to expenses or fees;

(G) has used the lawyer's services to perpetrate a crime or fraud.

(2) the lawyer's continued employment is likely to result in a violation of a rule of professional conduct;

(3) the lawyer's inability to work with cocounsel indicates that the best interests of the client likely will be served by withdrawal;

(4) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the employment effectively;

(5) the lawyer's client knowingly and freely assents to termination of the lawyer's employment;

(6) the lawyer believes in good faith in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

### Comment

A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest, and to completion.

A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may wish an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.

A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring the client to represent himself.

If the client is mentally incompetent, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and, in an extreme case, may initiate proceedings for a conservatorship or similar protection of the client.

A lawyer may withdraw from representation in some circumstances. Withdrawal is justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer also may withdraw where the client insists on a repugnant or imprudent objective.

A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client.

The lawyer may never retain papers to secure a fee. Generally, anything in the file which would be helpful to successor counsel should be turned over. This includes papers and other things delivered to the discharged lawyer by the client such as original instruments, correspondence, and canceled checks. Copies of all correspondence received and generated by the withdrawing or discharged lawyer should be released as well as legal instruments, pleadings, and briefs submitted by either side or prepared and ready for submission. The lawyer's personal notes and incomplete work product need not be released.

A lawyer who has represented an indigent on an appeal which has been concluded and who obtained a trial transcript furnished by the state for use in preparing the appeal must turn over the transcript to the former client upon request, the transcript being property to which the former client is entitled.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**Cross-References.** - See DR2-108(A) and DR2-109 and Model Rule 1.16.

**Editor's Note.** - Rule 2.8 is quite similar to Model Rule 1.16. Model Rule 1.16(d) does specifically allow a lawyer to retain papers relating to a client to the extent permitted by law. In contrast, Rule 2.8(a)(2) requires the lawyer to deliver all papers to the client. The comment accompanying this rule clearly points out that the lawyer may never retain client papers as security for payment of fees.

Rule 2.8(c) is substantially the same as Model Rule 1.16(b) concerning permissive withdrawal. Two provisions in the Model Rule do not have counterparts in the North Carolina Rules. The Model Rule allows withdrawal if continued representation will result in an unreasonable financial burden for the attorney and also allows withdrawal if other good cause exists.

With one exception, Rule 2.8 is identical to former DR2-109. Rule 2.8(c)(1)(G)'s language permitting withdrawal where the client has used the lawyer's services to perpetrate a crime or fraud did not appear in DR2-109.

The North Carolina Rules of Professional Conduct contains no provision similar to DR2-108 regarding acceptance of employment. Though not stated in the Rules, it would appear that a lawyer is generally compelled to refuse employment under circumstances which would require withdrawal from an ongoing attorney-client relationship.

For note on an attorney's right to compensation when discharged without cause from a contingent fee contract, see 15 Wake Forest L. Rev. 677 (1979).

## Case Notes

An attorney did not withdraw from representation when he sent his client a letter stating that he believed he could not handle the client's case and that the client should visit the office for further discussion. *North Carolina State Bar v. Sheffield*, 73 N.C. App. 349, 326 S.E.2d 320, cert. denied, 474 U.S. 981, 106 S. Ct. 385, 88 L.Ed.2d 338 (1985).

**Duty of Attorney to Withdraw.** - Where an attorney learns, prior to trial, that his client intends to commit perjury or participate in the perpetration of a fraud upon the court, he must withdraw from representation of the client, seeking leave of the court, if necessary. The right of a client to effective counsel in any case (civil or criminal) does not include the right to compel counsel to knowingly assist or participate in the commission of perjury or the creation or presentation of false evidence. In *Re Palmer*, 296 N.C. 638, 252 S.E.2d 784 (1979).

## Disciplinary Hearing Notes

The attorney was employed and paid in advance by an incarcerated client to pursue post-conviction relief. When the attorney failed to act on the client's behalf, the client discharged the attorney and demanded a refund. The attorney refused to refund the client any portion of the fee and refused to answer the State Bar's request for explanation. Two-year suspension. 82 DHC 10, 11.

Attorney required client to sign a release before turning over the client's file to her. Suspended one year, stayed three years upon certain conditions. 90 DHC 23.

Attorney refused to withdraw from case or return client's file when directed to do so by client. Attorney failed to respond to discovery requests and did not appear at disciplinary hearing. One-year suspension. 88 DHC 7.

Among other things, the attorney failed to refund unearned fees in two cases. Six-month suspension and an order of restitution. 91 DHC 24.

## Ethics Opinion Notes

**CPR 3.** A client is entitled to his file upon withdrawal of his attorney.

**CPR 61.** It is improper for a senior member of a law firm who is employed to represent a client to refer a case to a junior partner or associate without the client's consent.

**CPR 186.** It is permissible for an attorney to withdraw after giving notice of appeal when the client agrees that an appeal would be fruitless and the client assumes responsibility for retaining another attorney. The Rules of Court determine whether the tribunal's permission is required.

**CPR 269.** An attorney whose motion to withdraw from representation of a corporation is denied must continue to represent the corporation.

**CPR 315.** An attorney must give an indigent client the transcript provided by the State after disposition of the appeal.

**CPR 322.** After completion of custody litigation, an attorney must release a "home study" report to a client unless such is precluded by statute or court order.

**RPC 8.** An attorney employed by an insurer to represent an uninsured motorist must not withdraw after settlement between insurer and the claimant until the court gives permission and the attorney takes steps to minimize prejudice to his client.

**RPC 48.** Opinion outlines professional responsibilities of lawyers involved in a law firm dissolution.

**RPC 58.** Another member of a lawyer's firm may substitute for the lawyer in defending a criminal case if there is no prejudice to the client and the client and the court consent.

**RPC 79.** A lawyer who advances the cost of obtaining medical records before deciding whether to accept a case may not condition the release of the records to the client upon reimbursement of the cost.

**RPC 106.** Opinion discusses circumstances under which a refund of a prepaid fee is required.

**RPC 153.** In cases of multiple representation, a lawyer who has been discharged by one client must deliver to that client, as part of that client's file, information entrusted to the lawyer by the other client.

**RPC 157.** A lawyer may seek the appointment of a guardian for a client the lawyer believes to be incompetent over the client's objection if reasonably necessary to protect the client's interest.

**RPC 158.** Any portion of a sum of money paid by a client in advance to secure payment of a fee that is unearned at the time the lawyer is discharged must be refunded to the client.

**RPC 169.** A lawyer is not required to provide a former client with copies of title notes and may charge a former client for copies of documents from the client's file under certain circumstances.

**RPC 178.** Opinion examines the obligation to deliver the file to the client upon the termination of the representation when a lawyer represents multiple clients in a single matter.

## CANON III

### A Lawyer Should Assist in Preventing the Unauthorized Practice of Law

#### Rule 3.1 Aiding Unauthorized Practice of Law

(a) A lawyer shall not aid a person not licensed to practice law in North Carolina in the unauthorized practice of law.

(b) A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.

(c) A lawyer or law firm shall not employ a disbarred or suspended lawyer as a law clerk or legal assistant if that individual was associated with such lawyer or law firm at any time on or after the date of the acts which resulted in disbarment or suspension through and including the effective date of disbarment or suspension.

(d) A lawyer or law firm employing a disbarred or suspended lawyer as a law clerk or legal assistant shall not represent any client represented by the disbarred or suspended lawyer or by any lawyer with whom the disbarred or suspended lawyer practiced during the period on or after the date of the acts which resulted in disbarment or suspension through and including the effective date of disbarment or suspension.

#### Comment

The definition of the practice of law is established by N.C. Gen. Stat. 84-2.1. Limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. Paragraph (a) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer retains responsibility for the delegated work. See Rule 3.3 of this chapter. Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants, and persons employed in government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed *pro se*.

In the absence of statutory prohibitions or specific conditions placed on a disbarred or suspended attorney in the order revoking or suspending the license, such individual may be hired to perform the services of a law clerk or legal assistant by a law firm with which he or she was not affiliated at the time of or after the acts resulting in discipline. Such employment is, however, subject to certain restrictions. A licensed attorney in the firm must take full responsibility for and employ independent judgment in adopting any research, investigative results, briefs, pleadings, or other documents or instruments drafted by such individual. The individual may not directly advise clients or communicate in person or in writing in such a way as to imply that he or she is acting as an attorney or in any way in which he or she seems to assume responsibility for a client's legal matters. The disbarred or suspended attorney should have no communications or dealings with or on behalf of clients represented by such disbarred or suspended attorneys or by any individual or group of individuals with whom he or she practiced during the period on or after the date of the acts which resulted in discipline through and including the effective date of the discipline. Further, the employing attorney or law firm should perform no services for clients represented by the disbarred or suspended attorney during such period. Care should be taken to ensure that clients fully understand that the disbarred or suspended attorney is not

acting as an attorney, but merely as a law clerk or lay employee. Under some circumstances, as where the individual may be known to clients or in the community, it may be necessary to make an affirmative statement or disclosure concerning the disbarred or suspended attorney's status with the law firm. Additionally, a disbarred or suspended attorney should be paid on some fixed basis, such as a straight salary or hourly rate, rather than on the basis of fees generated or received in connection with particular matters on which he or she works. Under these circumstances, a law firm employing a disbarred or suspended attorney would not be acting unethically and would not be assisting a nonlawyer in the unauthorized practice of law.

An attorney or law firm should not employ a disbarred or suspended attorney who was associated with such attorney or firm at any time on or after the date of the acts which resulted in the disbarment or suspension through and including the time of the disbarment or suspension. Such employment would show disrespect for the court or body which disbarred or suspended the attorney. Such employment would also be likely to be prejudicial to the administration of justice and would create an appearance of impropriety. It would also be practically impossible for the disciplined lawyer to confine himself or herself to activities not involving the actual practice of law if he or she were employed in his or her former office setting and obliged to deal with the same staff and clientele.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**Cross-References.** - See DR3-101 and Model Rule 5.5.

**Editor's Notes.** - Rules 3.1(a) and (b) are the same as former DR3-101 and Model Rule 5.5. However, the North Carolina Rules of Professional Conduct contain additional provisions regarding the employment of disbarred or suspended lawyers. Neither the former Code nor the Model Rules discuss this subject.

For note on the unauthorized practice of law by corporations, see 65 N.C.L. Rev. 1422 (1987).

#### Case Notes

A licensed attorney who is a full-time employee of an insurance company may not ethically represent one of the company's insureds as counsel of record in an action brought by a third party for a claim covered by the terms of the insurance policy or appear as counsel of record for the insured in the prosecution of a subrogation claim for property damage. *Gardner v. North Carolina State Bar*, 316 N.C. 285, 341 S.E.2d 517 (1986).

#### Disciplinary Hearing Notes

Among other things, attorney engaged in the unauthorized practice of law when he performed legal work for residents of Florida and Maryland at a time when he was not licensed to practice in Florida or Maryland and was an inactive member of the Delaware Bar. Disbarred. 93 DHC 33.

#### Ethics Opinion Notes

**CPR 19.** House counsel for an insurance company may not represent an insured in prosecuting a subrogation claim.

**CPR 325.** House counsel of a savings and loan association may not represent a subsidiary of the savings and loan association acting as trustee for a deed of trust in foreclosure.

**CPR 326.** House counsel for an insurance company may not represent the insured in defense of a third party claim or in prosecution of a subrogation claim.

**RPC 9.** House counsel for a mortgage bank which originates loans but has no proprietary interest of its own may not represent borrowers or lenders in closing loans originated by his employer.

**RPC 40.** For the purposes of a real estate transaction, an attorney may, with proper notice to the borrower, represent only the lender, and the lender may prepare the closing documents. See also RPC 41.

**RPC 114.** Attorneys may give legal advice and drafting assistance to persons wishing to proceed *pro se* without appearing as counsel of record.

**RPC 139.** A lawyer may not sign an adoption petition prepared by an adoption agency as an accommodation to that agency without undertaking professional responsibility for the adoption proceeding.

**RPC 151.** Although a corporate insurer acting through its employees cannot practice law and appear on behalf of others, a lawyer who is a full-time employee of an insurance company may represent the company in an action where the company is a named party.

### **Rule 3.2 Dividing Legal Fees with a Nonlawyer**

A lawyer or law firm shall not share legal fees with a nonlawyer, except that

(a) an agreement by a lawyer with his or her firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to his or her estate or to one or more specified persons;

(b) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer or disbarred lawyer may pay to the estate of the deceased lawyer or to the disbarred lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer or disbarred lawyer;

(c) a lawyer or law firm may include nonlawyer employees in a retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

#### **Comment**

The provisions of this rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment.

**History Note:** Statutory Authority G.S. 84-23

**Readopted Effective** December 8, 1994

**Cross-References.** - See DR3-102(A) and Model Rule 5.4.

**Editor's Note.** - Rule 3.2 is quite similar to former DR3-102. In contrast to DR3-102(A)(2), however, Rule 3.2(b) expressly allows the same type of payments to be made to a disbarred lawyer as may be made to a deceased lawyer by the lawyer who completes unfinished legal business.

#### **Ethics Opinion Notes**

**CPR 239.** A law firm may set up a profit-sharing plan for firm members and lay employees.

**CPR 289.** It is improper for an attorney to agree to share a legal fee with a paralegal.

**CPR 343.** A succeeding attorney may share fee with a disbarred lawyer for services rendered prior to disbarment.

**RPC 38.** Attorneys in North Carolina may use an attorney placement service which places independent attorneys with other attorneys or firms on a temporary contract basis for a placement fee.

**RPC 104.** Associate attorneys may be leased back to their firms.

**RPC 147.** An attorney may not pay a percentage of fees to a paralegal as a bonus.

### **Rule 3.3 Responsibilities Regarding Nonlawyer Assistants**

With respect to a nonlawyer employed or retained by or associated with a lawyer,

(a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over a nonlawyer shall make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a nonlawyer that would violate the Rules of Professional Conduct if engaged in by a lawyer if

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

#### **Comment**

Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer should give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

**History Note:** Statutory Authority G.S. 84-23

**Readopted Effective** December 8, 1994

**Cross-References.** - See DR3-103(A), DR7-107(J), DR4-101(D) and Model Rule 5.3.

**Editor's Note.** - Rule 3.3 is identical to Model Rule 5.3. The Code contained no direct counterpart to Rule 5.3. Although DR3-103(A), DR7-107(J), and DR4-101(D) did contain provisions regarding the supervision of employees, those provisions did not impute liability to the supervising lawyer as does Rule 3.3.

#### **Ethics Opinion Notes**

**CPR 163.** An attorney may use a secretarial agency so long as reasonable care is used to protect confidentiality.

**CPR 182.** A layman may be employed to interview and represent social security claimants if the clients consent after disclosure of the layman's nonprofessional status.

**CPR 253.** A paralegal employed by a law firm may have a business card with the firm's identification.

**CPR 262.** A law firm's office manager may have a business card with the firm's identification.

**CPR 334.** An attorney's secretary may also work for private investigator. The attorney must take care that client confidences are not compromised.

**RPC 29.** An attorney may not rely upon title information from an abstract firm unless he supervised the nonlawyer who did the work.

**RPC 70.** A legal assistant may communicate and negotiate with a claims adjuster if directly supervised by the attorney for whom he or she works.

**RPC 74.** A firm which employs a paralegal is not disqualified from representing an interest adverse to that of a party represented by the firm

for which the paralegal previously worked if the paralegal is screened from participation in the case.

**RPC 102.** A lawyer may not permit the employment of court reporting services to be influenced by the possibility that the lawyer's employees might receive premiums, prizes or other personal benefits.

**RPC 139.** An attorney having undertaken to represent adoptive parents, may sign and file adoption petition prepared by social services organization under her direct supervision.

**RPC 152.** District attorney is responsible for plea negotiating practices of lay assistant under her supervision of which she has knowledge.

**RPC 176.** A lawyer who employs a paralegal is not disqualified from representing a party whose interests are adverse to that of a party represented by a lawyer for whom the paralegal previously worked.

**RPC 183.** A lawyer may not permit a legal assistant to examine or represent a witness at a deposition.

## CANON IV

### A Lawyer Should Preserve the Confidences of the Client

#### Rule 4 Preservation of Confidential Information

(a) "Confidential information" refers to information protected by the attorney-client privilege under applicable law, information received by a lawyer then acting as an agent of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court regarding another lawyer or judge seeking assistance, and other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client. For the purposes of this rule, "client" refers to present and former clients and to lawyers seeking assistance from lawyers' or judges' assistance programs approved by the North Carolina State Bar or the North Carolina Supreme Court.

(b) Except when permitted under Rule 4(c) below, a lawyer shall not knowingly

(1) reveal confidential information of his or her client;

(2) use confidential information of his client to the disadvantage of the client;

(3) use confidential information of his or her client for the advantage of himself or herself or a third person, unless the client consents after full disclosure.

(c) A lawyer may reveal

(1) confidential information, the disclosure of which is impliedly authorized by the client as necessary to carry out the goals of the representation;

(2) confidential information with the consent of the client or clients affected, but only after full disclosure to them;

(3) confidential information when permitted under the Rules of Professional Conduct or required by law or court order;

(4) confidential information concerning the intention of his or her client to commit a crime and the information necessary to prevent the crime;

(5) confidential information to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client; to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) confidential information to the extent permitted by the rules of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court.

#### Comment

The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they may avoid any violation of the law in the proper exercise of their rights.

The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure.

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers' or judges' assistance program. In that circumstance, providing for the confidentiality of such information encourages lawyers and judges to seek help through such programs. Conversely, without such confidentiality, lawyers and judges may hesitate to seek assistance, which may then result in harm to their professional careers and injury to their clients and the public. The rule therefore requires that any information received by a lawyer on behalf of an approved lawyers' or judges' assistance program be regarded as confidential and protected from disclosure to the same extent as information received by a lawyer in any conventional attorney-client relationship.

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority.

In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to a specified lawyer or lawyers.

The confidentiality rule is subject to limited exceptions. For instance, in becoming privy to information about a client, a lawyer may foresee that the client intends to commit a crime and may reveal that information to prevent the crime. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of communication by the client is encouraged than if it is inhibited.

Several situations must be distinguished. First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. Similarly, a lawyer has a duty not to use false evidence. This duty is essentially a special instance of the duty to avoid assisting a client in criminal or fraudulent conduct.

Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 7.2(a)(8) of this chapter, because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

Third, the lawyer may learn that a client intends prospective conduct that is criminal. As stated in paragraph (c)(4), the lawyer has professional discretion to reveal information in order to prevent the crime. It is, of course, sometimes difficult for a lawyer to "know" when such a purpose will actually be carried out, for the client may have a change of mind.

The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to take preventive action permitted by paragraph (c)(4) does not violate this rule.

After withdrawal the lawyer is required to refrain from making disclosure of the clients' confidences, except as otherwise provided in Rule 4. This rule does not prevent the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (c)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders

or other arrangements should be sought by the lawyer to the fullest extent practicable.

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal, or professional disciplinary proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by paragraph (c)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, Rule 4(b) requires the lawyer to invoke the attorney-client privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. A lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 4 is a matter of interpretation beyond the scope of these rules, but a presumption should exist against such a supersession.

The duty of confidentiality continues after the client-lawyer relationship has terminated.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

Cross-References. - See DR4-101 and Model Rule 1.6.

**Editor's Note.** - Rule 4 is substantially the same as former DR4-101. Rule 4 has replaced the words "confidence" and "secret" with the phrase "confidential information." Also, Rule 4 has clearly stated that it applies to present and former clients. Rule 4 also contains a provision expressly allowing disclosure of information which is impliedly authorized by the client. This provision is borrowed from Model Rule 1.6(a).

There are two important differences between Rule 4 and the Model Rules in regard to the treatment of confidential information. First, under Model Rule 1.6(b)(1), a lawyer may only reveal confidential information to the extent necessary to prevent a crime that he believes is likely to result in imminent death or substantial bodily harm. Rule 4(c)(4) allows disclosure of information necessary to prevent any crime. Second, the Model Rules do not expressly prohibit a lawyer from using confidential information for his or her own advantage or for the advantage of a third person as does Rule 4(b)(3). The Model Rules only condemn use of such information to the disadvantage of the client or former client. See Model Rules 1.8(b) and 1.9(b).

**Legal Periodicals.** - For article, "Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds," see 64 N.C.L. Rev. 443 (1986).

For article, "Incriminating Physical Evidence: The Defense Attorney's Dilemma and the Need for Rules," see 64 N.C.L. Rev. 897 (1986).

For comment, "Grand Jury Subpoenas to Defense Attorneys Representing Targets: An Ethical/Legal Tug of War," see 9 Campbell L. Rev. 347 (1987).

### Case Notes

**Statement to Insurance Adjuster.** - The attorney-client privilege does not cover a statement made to an insurance adjuster, not in the presence or at the request of counsel, and even before an attorney-client relation-

ship exists. *Phillips v. Dallas Carrier Corp.*, 133 F.R.D. 475 (M.D.N.C. 1990).

Quoted in *Travco Hotels, Inc. v. Piedmont Natural Gas Co.*, 332 N.C. 288, 420 S.E.2d 426 (1992).

### Disciplinary Hearing Notes

The attorney revealed confidential information of a client by disclosing to a creditor of the client that the attorney's law firm was holding funds belonging to the client. Public censure. 89 DHC 4.

### Ethics Opinion Notes

**CPR 268.** Although the duty of confidentiality continues after the death of a client, an attorney may discuss confidential matters with the heirs and the personal representative and may testify to such matters in a declaratory judgment action between heirs.

**CPR 284.** An attorney who in the course of representing one spouse obtains confidential information bearing upon the criminal conduct of the other spouse must not disclose such information.

**CPR 299.** An attorney, with the consent of the client, may utilize the services of a letter writing service in collection matters.

**CPR 300.** An attorney, after being discharged, cannot discuss the client's case with the client's new attorney without the client's consent.

**CPR 313.** An attorney may not voluntarily disclose confidential information concerning a client's criminal record.

**CPR 320.** Communications of a former client, now deceased, made in the presence of a girlfriend are not privileged and the attorney may testify at a later trial concerning such communications.

**CPR 362.** An attorney may not disclose the perjury of his partner's client.

**CPR 374.** Information concerning apparent tax fraud obtained by an attorney employed by a fire insurer to depose insureds concerning claims is confidential and may not be disclosed without the insurer's consent.

**RPC 12.** An attorney may reveal confidential information to correct a mistake if disclosure is impliedly authorized by the client.

**RPC 21.** An attorney may send a demand letter to an adverse party without identifying the client by name.

**RPC 23.** An attorney does not need the consent of the client to file Form 1099 including confidential information with the IRS incident to a real estate transaction since such is required by law.

**RPC 33.** An attorney may not disclose confidential information concerning the client's identity and criminal record without the client's con-

sent nor may an attorney misrepresent such information to the court. In response to a direct question from the court concerning such matters, an attorney may not misrepresent the defendant's criminal record but is under no ethical obligation to respond. If the client misrepresents his identity or record under oath, the attorney must ask the client to correct the misstatements. If the client refuses, the attorney must seek to withdraw.

**RPC 62.** An attorney may disclose client confidences necessary to protect her reputation where a claim alleging malpractice is brought by a former client against the insurance company which employed the attorney to represent the former client.

**RPC 77.** A lawyer may disclose confidential information to his or her liability insurer to defend against a claim but not for the sole purpose of assuring coverage.

**RPC 113.** A lawyer may disclose information concerning advice given to a client at a closing in regard to the significance of the client's lien affidavit.

**RPC 117.** An attorney may not reveal confidential information concerning a client's contagious disease without the client's consent.

**RPC 120.** An attorney may, but need not necessarily, disclose confidential information concerning child abuse pursuant to a statutory requirement.

**RPC 133.** A law firm may make its waste paper available for recycling.

**RPC 157.** A lawyer may seek the appointment of a guardian for a client the lawyer believes to be incompetent but in so doing the lawyer may disclose only her belief that there exists a good faith basis for the relief requested and may not disclose confidential information which led her to conclude the client is incompetent.

**RPC 175.** A lawyer may exercise his or her discretion to decide whether to reveal confidential information concerning child abuse or neglect pursuant to a statutory requirement.

**RPC 179.** A lawyer must comply with the client's request that the information regarding a settlement be kept confidential if the client enters into a settlement agreement conditioned upon maintaining the confidentiality of the terms of the settlement.

**RPC 195.** The lawyer who represented an estate and the personal representative in her official capacity may divulge confidential information relating to the representation of the estate and the personal representative to the substitute personal representative of the estate.

## CANON V

### A Lawyer Should Exercise Independent Professional Judgment on Behalf of the Client

#### Rule 5.1 Conflicts of Interest

(a) A lawyer shall not represent a client if the representation of that client will be or is likely to be directly adverse to another client, unless

(1) the lawyer reasonably believes the representation will not adversely affect the interest of the other client; and

(2) each client consents after full disclosure which shall include explanation of the implications of the common representation and the advantages and risks involved.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after full disclosure which shall include explanation of the implications of the common representation and the advantages and risks involved.

(c) A lawyer shall have a continuing obligation to evaluate all situations involving potentially conflicting interests and shall withdraw from representation of any party he or she cannot adequately represent or represent without using the confidential information or secrets of another client or former client except as Rule 4 of this chapter would permit with respect to a client.

(d) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after full disclosure.

## Comment

Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 2.8 of this chapter.

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Paragraph (a) applies only when the representation of one client would be directly adverse to the other.

Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

The lawyer's own interest should not be permitted to have adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Paragraph (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (b). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met.

Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise, and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved.

A lawyer for a corporation or other organization who is a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board, and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**Cross-References.** - See DR5-101(A) and DR5-105 and Model Rules 1.7 and 1.9.

**Editor's Note.** - Rules 5.1(a) and (b) generally track the language of Model Rule 1.7. In addition to prohibiting the representation of interests which are directly adverse to those of another client as does the Model

Rule, Rule 5.1(a) also condemns representation which "is likely to be" directly adverse. Rule 5.1 further expands upon the Model Rule by substituting the term "full disclosure" (with some elaboration) for "consultation" in subsections (a)(2) and (b)(2). Rule 5.1(c) alters Model Rule 1.9(B) to clearly state the attorney's continuing obligation to a former client regarding use of confidential information. Rule 5.1(d) is substantially the same as Model Rule 1.9(A) and represents a codification of the "substantial relationship" test developed by the courts in various jurisdictions. There was no single correlative provision in the Code of Professional Responsibility and most ethics opinions concerning former clients which were developed prior to the adoption of the Rules of Professional Conduct were predicated upon an expansive reading of DR4-101, DR5-101, and DR5-105 along with the admonition of Canon 9 that a lawyer should avoid even the appearance of impropriety. Likewise, the Code had no provision comparable to Rule 5.1(c). DR5-101(A) and DR5-105 are somewhat similar to Rules 5.1(a) and (b).

**Legal Periodicals.** - For comment, "An End to Settlement on the Courthouse Steps?" Mediated Settlement Conferences in North Carolina Superior Courts, see 71 N.C.L. Rev. 1857 (1993).

## Case Notes

**Conflict of Interest Not Shown.** - There was no conflict of interest involved where the attorney for the plaintiff in an action to impress a trust had represented a defendant in a divorce action against her former husband, her codefendant in this action. In this case the former client had consented to the attorney's representation of the current client, her foster mother, who knew of the prior representation. *Saintsing v. Taylor*, 57 N.C. App. 467, 291 S.E.2d 880, disc. rev. den., 306 N.C. 558, 294 S.E.2d 224 (1982).

A law firm which represented an insurance company in securing information to bring the insurance company back into compliance with North Carolina law and in rehabilitation proceedings was not prohibited from representing minority shareholders of the company in a derivative action against the company's directors. *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E.2d 279 (1978), appeal dismissed, 296 N.C. 740, 254 S.E.2d 181 (1979).

**Conflict of Interest Shown.** - The attorneys for the plaintiffs could not represent the receivers of a group of corporations who were appointed to preserve assets of all the corporations when the plaintiffs were seeking to have assets transferred from some corporations in the group to other corporations. *Lowder v. All Star Mills, Inc.*, 60 N.C. App. 275, 300 S.E.2d 230, aff'd in pt., rev'd in pt., 309 N.C. 695, 309 S.E.2d 193 (1983).

In a suit against the United States to recover losses resulting from an airplane crash, representation by the Department of Justice of both the United States and individual air traffic controllers would create a conflict of interest and would prevent adequate representation of the individual controllers. *Aetna Cas. & Sur. Co. v. United States*, 438 F. Supp. 886 (W.D.N.C. 1977), rev'd, 570 F.2d 1187 (4th Cir.), cert. denied, 439 U.S. 821, 99 S. Ct. 87, 58 L. Ed. 2d 113 (1978).

**Refusal to Disqualify Counsel.** - In a derivative action in which the defendant waited 22 months before moving to disqualify the plaintiffs' counsel on the ground of prior representation of the defendant by the attorney who referred the derivative action to the plaintiffs' counsel, the trial court did not abuse its discretion in refusing to disqualify counsel. *Lowder v. All Star Mills Inc.*, 60 N.C. App. 275, 300 S.E.2d 230, aff'd in pt., rev'd in pt., 309 N.C. 695, 309 S.E.2d 193 (1983).

**Consent Procured Without Advice of Disinterested Counsel.** - The consent of an individual litigant to representation by counsel with a potential conflict of interest cannot be presumed to be fully informed when it is procured without the advice of a lawyer who has no conflict of interest. *Aetna Cas. & Sur. Co. v. United States*, 438 F. Supp. 886 (W.D.N.C. 1977), rev'd, 570 F.2d 1187 (4th Cir.), cert. denied, 439 U.S. 821, 99 S. Ct. 87, 58 L. Ed. 2d 113 (1978).

**Potential Conflict Not Sufficient to Interfere with Right of Counsel.** - A potential conflict of interest, as distinguished from an actual conflict of interest, is not sufficient to warrant the State's interference with the constitutionally guaranteed right of a criminal defendant to retain and be represented by counsel of his choice. *State v. Yelton*, 87 N.C. App. 554, 361 S.E.2d 753 (1987).

Although defendant claimed that the joint representation of two accomplices created a conflict of interest between their attorney and the public's interest in the fair administration of justice due to what he labeled as the artificial conformity of the testimony of the accomplices, defendant's interests were not sufficient to overcome the accomplices' rights to representation by counsel of their choice where defendant failed to show that the potential conflict of interest prejudiced his rights. *State v. Whiteside*, 325 N.C. 389, 383 S.E.2d 911 (1989).

**Hearing on Conflict of Interest.** - Once a motion by the State or the defense, or the court on its own motion, raises a possible conflict of interest in a dual representation situation, the trial court must conduct a hearing. *State v. Yelton*, 87 N.C. App. 554, 361 S.E.2d 753 (1987).

Quoted in *Travco Hotels, Inc. v. Piedmont Natural Gas Co.*, 332 N.C. 288, 420 S.E.2d 426 (1992); *State v. Reid*, 334 N.C. 551, 434 S.E.2d 193 (1993).

## Disciplinary Hearing Notes

The attorney accepted employment to represent individuals against a company in which he owned an interest without disclosing his interest to his client. Private reprimand. 79 DHC 26.

The attorney provided legal services to two clients regarding the purchase and development of real property owned by the attorney and the clients, despite the fact that the attorney's judgment was likely to be impaired by his own personal, financial and business interests respecting the property. One-year suspension. 89 DHC 14.

Among other things, the attorney hired his girlfriend to do work for a client and permitted his girlfriend to charge the client excessively. One Year Suspension, stayed on certain conditions. 92 DHC 5.

The attorney represented the seller in commercial real estate transaction while he was also general partner of the buyer. The attorney also improperly directed a \$165,000 credit to the buyer and a corresponding debit to the seller at the closing of the transaction without the seller's consent and paid himself \$150,000 in attorneys' fees from funds held in escrow, in violation of the escrow agreement. Three-year suspension. 92 DHC 16.

Attorney who obtained a judgment on a debt purchased property at the execution sale on the judgment through a corporation controlled by attorney without the informed consent of the attorney's client. Six-month suspension, stayed on certain conditions. 93 DHC 15.

## Ethics Opinion Notes

I. General Conflicts.

II. Real Property Conflicts.

### I. GENERAL CONFLICTS.

**CPR 9.** An attorney may not give a title opinion to an individual and then represent another person in a boundary dispute against that individual.

**CPR 15.** A lawyer/guardian may not give a title opinion to the purchaser of his ward's property.

**CPR 46.** Once it is determined that attorneys from same firm have undertaken to represent adverse parties, one must withdraw and the other may continue only with the consent of all involved.

**CPR 55.** An attorney appointed as examiner of title is not prohibited from representing petitioners or respondents in actions unrelated to the Torrens proceeding.

**CPR 68.** An attorney may serve on the board of a legal aid society and represent a client against a party represented by a legal aid lawyer.

**CPR 119.** It is improper for a judgment creditor's attorney or his partner or his lay employee to serve as a referee in supplemental proceedings.

**CPR 140.** It is improper for an attorney who formerly represented a creditor to later represent the debtor in the same action.

**CPR 147.** An attorney cannot defend an action brought by a former client when confidential information obtained during the prior representation would be relevant to the defense of the current action.

**CPR 159.** It is proper for an attorney to prepare a will for a woman and later represent her husband in a domestic action so long as the prior representation is not substantially related to the present action.

**CPR 169.** An attorney may represent the defendant in a lawsuit after having been first approached by the plaintiff if no attorney-client relationship was formed.

**CPR 171.** A part-time county attorney may not serve as guardian ad litem if official duties include advising Department of Social Services.

**CPR 179.** An attorney may not represent a municipality and a distributee of an estate suing the municipality.

**CPR 195.** An attorney may not act as a private prosecutor against a former client who sought his advice concerning the domestic problems which culminated in the subject homicide.

**CPR 216.** An attorney may not serve as receiver and as attorney for a judgment creditor.

**CPR 249.** An attorney who owns an insurance agency may not represent claimants against persons insured by companies his agency represents.

**CPR 255.** An attorney who is employed by an insurer to defend its insureds on a regular basis represents the insurer and the insureds and, if a conflict develops between the insurer and an insured, the attorney has a duty to advise the insured to seek independent counsel. The attorney may represent a plaintiff against the insurer, but he or she should notify the insurer and have the informed consent of plaintiff.

**CPR 273.** An attorney may not represent a neighborhood group in opposition to another group he previously represented concerning the same or substantially related subject matter.

**CPR 281.** An attorney may sue another attorney for malpractice on behalf of a client even though the attorney for the plaintiff owns stock in the defendant's liability insurance company.

**CPR 286.** An attorney may participate in a mediation service with marriage counselors but should not later represent either party in domestic litigation.

**CPR 317.** An attorney appointed to represent a state official or agency may not represent other clients in a suit against the same official or agency, another official or agency under the jurisdiction of that same official or agency, or another official or agency with authority over the official or agency. Nor should an attorney represent one official or agency while representing other clients against another official or agency if both of the officials or agencies are under the jurisdiction of the same official or agency.

**CPR 323.** An attorney may not act as a friend and attempt to mediate a domestic problem and later represent the wife in domestic litigation.

**CPR 344.** An attorney for a school board is not automatically disqualified from representing criminal defendants despite the school board's interest in fines and forfeitures.

**RPC 18.** An attorney may not simultaneously represent shareholders in a derivative action and the corporation's landlord on a claim for back rent.

**RPC 22.** An attorney may not represent the administratrix officially and personally where her interests in the two roles are in conflict without the consent of the heirs.

**RPC 24.** An attorney may not purchase his client's property at an execution sale on his own account.

**RPC 28.** An attorney may represent the estate of pilot and the estate of passenger in a wrongful death case against the airplane manufacturer if attorney is convinced that there was no pilot negligence and if the representatives of both estates consent.

**RPC 32.** An attorney who represented a husband, and wife in certain matters may not later represent the husband in an action for alimony and equitable distribution.

**RPC 53.** A lawyer may sue a municipality although his partner serves as a member of its governing body.

**RPC 54.** A lawyer who represents a criminal defendant from whose possession property was seized may not without consent seek the property as a fine or forfeiture on behalf of the local school board.

**RPC 55.** A member of the Attorney General's staff may prosecute appeals of adverse Medicaid decisions against the Department of Human Resources, which is represented by another member of the Attorney General's staff.

**RPC 56.** A lawyer may represent a plaintiff against an insurance company's insured while defending other persons insured by the company in unrelated matters.

**RPC 59.** A lawyer may represent an insurer and its insured as coplaintiffs in a declaratory judgment action.

**RPC 60.** Subject to general conflict of interest rules, a lawyer may represent police officers who are referred by a professional organization of which they are members on a case-by-case basis and also represent criminal defendants.

**RPC 65.** The public defender's office should be considered as a single law firm and staff attorneys may not represent codefendants with conflicting interests unless both consent and can be adequately represented.

**RPC 72.** An attorney hired by the Bureau of Indian Affairs to prosecute criminal charges before a tribal court may represent defendants in state or federal court despite the fact that the defendants have been arrested by members of the tribal police force.

**RPC 73.** Opinion clarifies two lines of authority in prior ethics opinions. Where an attorney serves on a governing body, such as a county commission, the attorney is disqualified from representing criminal defendants where a member of the sheriff's department is a prosecuting witness. The attorney's partners are not disqualified.

Where an attorney advises a governing body, such as a county commission, but is not a commissioner herself, and in that capacity represents the sheriff's department relative to criminal matters, the attorney may not represent criminal defendants if a member of the sheriff's department will be a prosecuting witness. In this situation the attorney's partners would also be disqualified from representing the criminal defendants.

**RPC 74.** A firm which employs a paralegal is not disqualified from representing an interest adverse to that of a party represented by the firm for which the paralegal previously worked if the paralegal is screened from participation in the case.

**RPC 91.** An attorney employed by the insurer to represent the insured and its own interests may not send the insurer a letter on behalf of the insured demanding settlement within the policy limits.

**RPC 92.** An attorney representing both the insurer and the insured need not surrender to the insured copies of all correspondence concerning the case between herself and the insurer.

**RPC 95.** An assistant district attorney may prosecute cases while serving on the school board.

**RPC 100.** An attorney serving on a hospital ethics committee is not automatically disqualified from representing interests adverse to the hospital or its staff physicians.

**RPC 102.** A lawyer may not permit the employment of court reporting services to be influenced by the possibility that the lawyer's employees might receive premiums, prizes or other personal benefits.

**RPC 103.** A lawyer for the insured and the insurer may not enter voluntary dismissal of the insured's counterclaim without the insured's consent.

**RPC 105.** A public defender may represent criminal defendants while serving on the school board.

**RPC 109.** An attorney may not represent parents as guardians ad litem for their injured child and as individuals concerning their related tort claims after having received a joint settlement offer which is insufficient to fully satisfy all claims.

**RPC 110.** An attorney employed by an insurer to defend in the name of the defendant pursuant to underinsured motorist coverage may not communicate with that individual without the consent of another attorney employed to represent that individual by her liability insurer, and the attorney employed by the liability insurer may not take a position on behalf of the insurer which is adverse to the insured.

**RPC 111.** An attorney retained by a liability insurer to defend its insured may not advise insured or insurer regarding the plaintiff's offer to limit the insured's liability in exchange for consent to an amendment of the complaint to add a punitive damages claim.

**RPC 112.** An attorney retained by an insurer to defend its insured may not advise insurer or insured regarding the plaintiff's offer to limit the insured's liability in exchange for an admission of liability.

**RPC 123.** An attorney may represent parents and an independent guardian ad litem for their child concerning related tort claims under certain circumstances.

**RPC 131.** An attorney employed to represent a county in appellate matters may also sue the county's department of social services if the county and the plaintiffs consent.

**RPC 137.** An attorney who formerly represented an estate may not subsequently defend the former personal representative against a claim brought by the estate.

**RPC 140.** There is no disqualifying conflict of interest where an attorney is retained by an insurer to represent an insured during the pendency of a declaratory judgment action relating to coverage in which the attorney is a nonparticipant.

**RPC 144.** A lawyer having undertaken to represent two clients in the same matter may not thereafter represent one against the other in the event their interests become adverse without the consent of the other.

**RPC 151.** Where an insurance company and its policyholder are both parties to an action, a lawyer who is a full-time employee of the insurance company may not represent both the insurance company and the policyholder because of the "diluted responsibility" to the policyholder created by the employment relationship between the lawyer and the insurance company.

**RPC 154.** An attorney may not represent the insured, her liability insurer and the same insurer relative to underinsured motorist coverage carried by the plaintiff.

**RPC 160.** A lawyer whose associate is a member of a hospital's board of trustees may not sue the hospital on behalf of a client.

**RPC 168.** A lawyer may ask her client for a waiver of objection to a possible future representation presenting a conflict of interest if certain conditions are met.

**RPC 170.** A lawyer may jointly represent a personal injury victim and the medical insurance carrier that holds a subrogation agreement with the victim provided the victim consents and the lawyer withdraws upon the development of an actual conflict of interest.

**RPC 177.** A lawyer may represent the insured, his liability insurer, and the same insurer relative to underinsured motorist coverage carried by the plaintiff if the insurer waives its subrogation rights against the insured and the plaintiff executes a covenant not to enforce judgment.

## **II. REAL PROPERTY CONFLICTS.**

**CPR 100.** In the usual residential loan transaction:

(a) A lawyer may ethically represent both the borrower and the lender.

(b) If the lawyer intends not to represent both the borrower and the lender, he must give timely notice to the one he intends not to represent of this fact, so that the one not represented may secure separate and timely representation.

(c) If the lawyer does not give such notice, he shall be deemed to represent both the borrower and the lender.

(d) If the lawyer represents only the borrower, he may nevertheless ethically provide the title and lien priority assurances required by the lender as a condition of the loan.

(e) The lawyer shall clearly state to his client(s), whether the borrower or the lender, or both, whom he represents and the general scope of his representation.

(f) If the lawyer does not represent both principals, and the one he does not represent retains another lawyer to represent him, both lawyers should fully cooperate with each other in serving the interests of their respective clients and in closing the loan promptly.

(g) If the lawyer represents both the borrower and the lender, he may be ethically barred from representing either one (without the consent of the other) if a controversy arises between the borrower and the lender before, during or after the closing.

It is not unethical for a lawyer representing the borrower and the lender (or either) in the usual residential loan transaction to prepare a deed from the seller to the buyer, collect the purchase price for the seller, or draft other documents (such as a second deed of trust and not secured thereby) as may be necessary to complete the transaction between the seller and the buyer in accordance with their agreement, and charge the seller therefor.

It is not unethical for the lawyer representing the borrower, the lender and the seller (or one or more of them) to provide the title insurer with an opinion on title sufficient to issue a mortgagee's title insurance policy, the premium for which is normally paid by the borrower.

**CPR 107.** An attorney/trustee in a foreclosure proceeding which is not contested by the owner-borrower may represent the lender in resisting a tenant's suit to restrain foreclosure.

**CPR 137.** An attorney/trustee in a foreclosure proceeding may not represent the lender when the foreclosure is contested by the borrower.

**CPR 166.** An attorney/trustee cannot ethically represent either the lender or the borrower in a role of advocacy at any state of the foreclosure proceeding. In the absence of controversy the trustee may present, on behalf of the lender, the evidence necessary to support the clerk's findings essential to a foreclosure order. Even if the proceeding is adversary, he may ethically perform for himself such legal services as are necessary to the performance of his fiduciary duties.

**CPR 201.** When an attorney/trustee learns that a foreclosure will be contested, he may resign as trustee and represent the lender.

**CPR 220.** An attorney's secretary may not be trustee if the attorney wishes to represent the lender at a contested foreclosure.

**CPR 243.** An attorney may certify title to the State for purposes of condemnation and later represent the landowner against the State in a suit for damages if all consent.

**CPR 264.** After initiating foreclosure, an attorney/trustee may not represent the lender in defense of the borrower's suit for injunctive relief.

**CPR 275.** An attorney who is part owner of a mortgage brokerage firm may certify title to real property with respect to which the mortgage broker has arranged financing.

**CPR 297.** An attorney/trustee cannot represent a husband-debtor in a partition action against his wife-debtor, but he may resign as trustee and then represent the husband.

**CPR 305.** An attorney/trustee cannot represent the lender in bankruptcy court in seeking relief from an automatic stay in order to commence foreclosure.

**RPC 3.** An attorney/trustee is not prohibited from continuing to serve as trustee in a contested foreclosure if he represented the seller at the closing.

**RPC 40.** For the purposes of a real estate transaction, an attorney may, with proper notice to the borrower, represent only the lender, and the lender may prepare the closing documents. See also RPC 41.

**RPC 44.** A closing attorney must follow the lender's closing instruction that closing documents be recorded prior to disbursement.

**RPC 46.** An attorney acting as trustee in a foreclosure proceeding may not, while serving in that capacity, file a motion to have an automatic stay lifted in the debtor's bankruptcy proceeding.

**RPC 49.** Attorneys who own stock in a real estate company may refer clients to the company if such would be in the clients' best interest and there is full disclosure, and such attorneys may not close transactions brokered by the real estate firm.

**RPC 64.** A lawyer who served as a trustee may after foreclosure sue the former debtor on behalf of the purchaser.

**RPC 78.** A closing attorney cannot make conditional delivery of trustee account checks to real estate agent before depositing loan proceeds against which checks are to be drawn.

**RPC 82.** This opinion comprehensively revises the ethical responsibilities of the attorney/trustee.

**RPC 83.** The significance of an attorney's personal interest in property determines whether he or she has a conflict of interest sufficient to disqualify him or her from rendering a title opinion concerning that property.

**RPC 86.** Opinion discusses disbursement against uncollected funds, accounting for earnest money paid outside closing and representation of the seller.

**RPC 88.** A lawyer may close a real estate transaction brokered by a real estate firm which employs the attorney's secretary as a part-time real estate broker.

**RPC 90.** A lawyer who as a trustee initiated a foreclosure proceeding may resign as trustee after the foreclosure is contested and act as lender's counsel.

**RPC 121.** A borrower's lawyer may render a legal opinion to the lender.

**RPC 185.** A lawyer who owns any stock in a title insurance agency may not give title opinions to the title insurance company for which the title insurance agency issues policies.

**RPC 188.** A lawyer may close a real estate transaction brokered by the lawyer's spouse with the consent of the parties to the transaction.

**RPC 201.** Opinion explores the circumstances under which a lawyer who is also a real estate salesperson may close real estate transactions brokered by the real estate company with which he is affiliated.

## **Rule 5.2 The Lawyer as Witness**

(a) A lawyer shall not accept employment in contemplated or pending litigation if the lawyer knows or it is obvious that he or she or a lawyer in his or her firm ought to be called as a witness, except that the lawyer may undertake the employment and the lawyer or a lawyer in his or her firm may testify

(1) if the testimony will relate solely to an uncontested matter;

(2) if the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;

(3) if the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his or her firm to the client;

(4) as to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his or her firm as counsel in the particular case.

(b) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a lawyer in his or her firm ought to be called as a witness on behalf of the client, the lawyer shall withdraw from the conduct of the trial and his or her firm, if any, shall not continue representation in the trial, except that the lawyer may continue the representation and the lawyer or a lawyer in his or her firm may testify under the circumstances enumerated in (a) above.

(c) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or she or a lawyer in his or her firm may be called as a witness other than on behalf of the client, the lawyer may continue the representation until it is apparent that the lawyer's testimony is or may be prejudicial to the client.

### **Comment**

Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client.

A witness is required to testify on the basis of personal knowledge while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(3) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has first-hand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

Apart from these two exceptions, paragraph (a)(4) recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**Cross-References.** - See DR5-101(B) and DR5-102, and Model Rule 3.7.

**Editor's Note.** - Rule 5.2 is virtually identical to DR5-101(B) and DR5-102. Rule 5.2 is similar to Model Rule 3.7. There is no correlative provision in the Model Rules to Rule 5.2(a)(2).

### **Case Notes**

This rule only applies to lawyers, not their employees. *Seafare Corp. v. Trenor Corp.*, 88 N.C. App. 404, 363 S.E.2d 643, cert. denied, 322 N.C. 113, 367 S.E.2d 917 (1988).

**Counsel Is Not Incompetent to Testify.** - The weight of authority in this country is that while it is a breach of professional ethics for a party's attorney to testify about other than formal matters without withdrawing from the litigation, he is not incompetent to testify. The testimony is admissible if otherwise competent. *Town of Mebane v. Iowa Mutual Insurance Co.*, 28 N.C. App. 27, 220 S.E.2d 623 (1975).

**But Is Discouraged from Doing So.** - The Supreme Court of North Carolina has historically discouraged the practice of attorneys testifying on behalf of clients, and although it has been allowed, in most instances the lawyer acting as a witness for his client had previously surrendered his right to participate in the litigation. *Town of Mebane v. Iowa Mutual Insurance Co.*, 28 N.C. App. 27, 220 S.E.2d 623 (1975).

**Exceptions Where Counsel May Testify for Client.** - While the Disciplinary Rules set forth in the Code of Professional Conduct (now replaced by the Rules of Professional Conduct) do not control the admissibility of evidence or the competency of witnesses, they do govern the ethics and conduct of attorneys licensed to practice law in the State. It should be the policy of the courts to give effect to these rules which specifically address the question of when an attorney may be a witness for a party he represents. Both the Code of Professional Conduct and the

common practice recognized by the North Carolina Supreme Court provide for exceptions where attorneys may testify on their clients' behalf. *Town of Mebane v. Iowa Mutual Insurance Co.*, 28 N.C. App. 27, 220 S.E.2d 623 (1975).

**Testimony for Client Before Administrative Board.** - There is no compelling reason to extend existing law by holding that evidence presented by an attorney who testifies while representing a client before a local administrative board may not be considered by such local administrative board. However, attorneys are strongly discouraged from serving as both witnesses and advocates, even before local administrative boards, unless compelling circumstances exist. *Robinhood Trails Neighbors v. Winston-Salem Zoning Bd. of Adjustment*, 44 N.C. App. 539, 261 S.E.2d 520, disc. rev. denied, 299 N.C. 737, 267 S.E.2d 663 (1980).

**Discretion of Trial Judge.** - Whether to allow defense counsel to testify on a collateral matter, impeachment of a witness, is in the discretion of the trial judge. *State v. Elam*, 56 N.C. App. 590, 289 S.E.2d 857, cert. denied, 305 N.C. 461, 292 S.E.2d 577 (1982).

**Request by Defendant for Withdrawal of Plaintiff's Counsel.** - Defendant's request that counsel for plaintiff be precluded from testifying at trial or that his law firm be disqualified from further representation of plaintiff would be denied, where plaintiff had not yet determined who its witnesses would be. If plaintiff subsequently determined that counsel should be called as a witness at trial, then the court, at the appropriate time, could order his withdrawal, as well as that of his law firm. *FDIC v. Kerr*, 111 F.R.D. 476 (W.D.N.C. 1986).

Stated in *Spivey v. United States*, 912 F.2d 80 (4th Cir. 1990). Cited in *Central Carolina Nissan, Inc. v. Sturgis*, 98 N.C. App. 253, 390 S.E.2d 730 (1990); *State ex rel. Long v. American Sec. Life Assurance Co.*, 109 N.C. App. 530, 428 S.E.2d 200 (1993); *Berkeley Fed. Sav. & Loan Ass'n v. Terra Del Sol, Inc.*, 111 N.C. App. 692, 433 S.E.2d 449 (1993).

### Ethics Opinion Notes

**CPR 18.** An attorney may testify on behalf of his former client after he has withdrawn, even if he is to be reimbursed for expenses advanced while he was employed from any recovery.

**CPR 62.** A lawyer who must testify for a party generally may not represent that party, even with the consent of the adverse party.

**CPR 162.** An attorney may testify as to the value of his services, but may not testify as to his client's emotional condition.

**CPR 165.** An attorney cannot represent the propounders in a caveat proceeding when an associate or partner will testify for the propounders.

**CPR 190.** Attorneys sharing office space who are not partners are considered members of the same firm for the purpose of this rule.

**CPR 212.** An attorney who is sued may have his partner represent him and may testify in his own behalf without his partner's having to withdraw.

**CPR 244.** Members of attorney/executor's law firm may not represent the attorney/executor if the attorney/executor ought to be called as a witness in a caveat proceeding.

**CPR 350.** An attorney may continue to serve as administrator C.T.A. even though his secretary may testify as a witness.

**RPC 19.** An attorney may represent a client even though his secretary must be called as a witness.

**RPC 124.** An attorney may not agree to bear the costs of federal class action litigation.

**RPC 134.** An attorney may not accept an assignment of her client's judgment while representing the client on appeal of the judgment.

**RPC 142.** A lawyer may not represent an estate in litigation against a claimant where the lawyer's testimony may be necessary to resolve the validity of the claim.

## Rule 5.3 Avoiding Acquisition of Interest in Litigation

(a) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he or she is conducting for a client, except that the lawyer may

(1) acquire a lien granted by law to secure his or her fee or expenses;

(2) contract with a client for a reasonable contingent fee in civil cases, except as prohibited by Rule 2.6 of this chapter.

(b) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

### Comment

A lawyer's acquisition of a proprietary interest in the client's cause of action or any *res* involved therein might cloud the lawyer's judgment and impair his or her ability to function as an advocate.

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Readopted Effective December 8, 1994

### Case Notes

There is no inhibition in the law against a lawyer contracting to pay for services needed in a case he is handling, so long as the client remains ultimately liable to him for such expenses.

**Obligation to Pay Expert.** - When a lawyer hiring an expert to help on a case says or does nothing to indicate that the obligation to pay is not his, the expert can reasonably assume that the lawyer is the contracting party, rather than the client. *Gualtieri v. Burleson*, 84 N.C. App. 650, 353 S.E.2d 652, disc. rev. denied, 320 N.C. 168, 358 S.E.2d 50 (1987).

A fee arrangement whereby a law firm would receive a one-third interest in the shares it was representing in a derivative action by minority shareholders of a corporation against the directors of the corporation did not constitute an acquisition by the law firm of an improper interest in the subject matter of the litigation. *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E.2d 279 (1978), appeal dismissed, 296 N.C. 740, 254 S.E.2d 181 (1979).

### Ethics Opinion Notes

**CPR 11.** An attorney may contract to receive an interest in real property as a contingent fee for legal representation in an action to clear title to the subject property.

**CPR 157.** An attorney handling a personal injury case may advance the cost of the client's medical examination if such is actually an expense of litigation for which the client remains ultimately liable.

**CRP 291.** An attorney who has procured a judgment for a client that has not been collected by the ninth year may purchase the judgment if the client does wish to renew it, but this practice is not encouraged.

**CPR 364.** An attorney may not purchase a judgment even though the client needs money immediately.

**RPC 76.** A lawyer may advance his client's fine.

**RPC 80.** A lawyer may not lend money to a client who is represented in pending or contemplated litigation except to finance costs of litigation.

**RPC 173.** A lawyer who represents a client on a criminal charge may not lend the client the money necessary to post bond.

**RPC 187.** A lawyer may not ask a client for authorization to instruct the clerk of court to forward the client's support payments to the lawyer in order to satisfy the client's legal fees.

## Rule 5.4 Limiting Business Relations with a Client

(a) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his or her professional judgment therein for the protection of the client unless the client has consented after full disclosure. A lawyer shall not enter into a business transaction with a client under any circumstances unless it is fair to the client.

(b) Prior to conclusion of all aspects of the matter giving rise to his or her employment, a lawyer shall not enter into any arrangement or understanding with a client or a prospective client by which the lawyer acquires an interest in publication rights with respect to the subject matter of the employment or proposed employment.

(c) During or subsequent to legal representation of a client, a lawyer shall not enter into a business transaction with a client for which a fee or commission will be charged in lieu of, or in addition to, a legal fee if the business transaction is related to the subject matter of the legal representation, any financial proceeds from the representation, or any information, confidential or otherwise, acquired by the lawyer during the course of the representation.

### Comment

As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage or the lawyer's own advantage unless the client consents after full disclosure. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment.

An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (b) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property if the arrangement conforms to Rules 2.6 and 5.3 of this chapter.

Because of actual and potential conflicts of interests, a lawyer may not sell business services to a client or former client if the proposed transaction relates to the subject matter or the proceeds of representation. For example, a lawyer who is also a securities broker or insurance agent should not endeavor to sell securities or insurance to a client when he knows by virtue of the representation that such client has received funds suitable for investment.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**Cross-References.** - See DR5-104 and Model Rules 1.8(a), 1.8(b) and 1.8(d).

**Editor's Notes.** - Rules 5.4(a) and (b) are identical to DR5-104(A) and (B), respectively, except that Rule 5.4(a) contains the additional requirement that any business transaction between lawyer and client be fair to the client. The Code of Professional Responsibility contained no counterpart to Rule 5.4(c).

Model Rules 1.8(a) and (b) are similar to Rule 5.4(a). Model Rule 1.8(d) is similar to Rule 5.4(b). The Model Rules do not contain a counterpart to Rule 5.4(c).

**Legal Periodicals.** - For article, "Malpractice and Ethical Considerations," see 19 N.C. Cent. L.J. 165 (1991).

## Disciplinary Hearing Notes

The attorney certified title to 77 acres of his client's land. A dispute ensued over 47 acres. The attorney advised the client that it would cost \$5,000 to settle the dispute. The client could not afford this amount so the attorney offered to purchase all the property for \$2800. The client sold the property to the attorney for \$3550. The attorney did not pay fair market value for the property and later sold the property for \$30,000. Eighteen-month suspension. 85 DHC 7.

Among other things, the attorney invested the proceeds from a wrongful death action in a corporation in which the attorney owned a 90% interest, without the knowledge or consent of his client. Eighteen-month suspension. 80 DHC 16.

The attorney entered into a contract with a client to purchase property of the client which proved ultimately to be unfair to the client. Six-month suspension, stayed three years upon certain conditions. 89 DHC 41.

Attorney purchased house from 81 year-old client for less than fair market value without fully disclosing risks of transaction and without advising client to seek independent counsel. One-year suspension, stayed for three years and order to reconvey property to client. 92 DHC 8.

Among other things, attorney borrowed money from client funds on deposit in his trust account without evidencing these transactions by promissory notes or other documentation. One-year suspension, stayed for three years upon certain conditions. 93 DHC 20.

Attorney borrowed \$10,000 of insurance proceeds from a disabled widow without securing the loan, without providing for the payment of interest and without advising the widow to consult independent counsel. Two-year suspension, one year stayed upon certain condition. 93 DHC 35.

## Ethics Opinion Notes

**CPR 241.** An attorney may practice law and sell insurance but must keep the law practice and the insurance business separate in all respects. The attorney should not sell insurance to clients for whom he has provided legal services involving estate planning.

**CPR 266.** An attorney may engage in the investment banking business and practice law from the same suite of offices.

**CPR 307.** An attorney may practice law and sell real estate, but may not certify title to property he has listed or sold.

## Rule 5.5 Client Gifts

A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

### Comment

A lawyer may accept a gift from a client if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide. The rule recognizes an exception where the client is a relative of the donee or the gift is not substantial.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**Cross-References.** - See Model Rule 1.8(c).

**Editor's Note.** - Rule 5.5 contains language identical to Model Rule 1.8(c). The Code contained no Disciplinary Rule on this subject, although Ethical Consideration 5.5 provided that "a lawyer should not suggest to his client that a gift be made to himself or for his benefit" and also that "other than in exceptional circumstances, a lawyer should insist that

an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client."

### **Ethics Opinion Notes**

**CPR 135.** It is not improper for a legal aid society to request clients to donate unused trust funds to the society.

**CPR 217.** An attorney appointed to represent an indigent client may not accept money as a "gift" from the client's father.

## **Rule 5.6 Fees from Persons Other Than the Client**

A lawyer shall not accept compensation for representing a client from one other than the client unless

- (1) the client consents after full disclosure
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to representation of the client is protected as required by Rule 4 of this chapter.

### **Comment**

A lawyer may be paid from a source other than the client if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. For instance, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

Rule 5.6 requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 4 of this chapter concerning confidentiality and Rule 5.1 of this chapter concerning conflict of interest. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**Cross-References.** - See DR5-107(A) and (B), and Model Rule 1.8(f).

**Editor's Note.** - Rule 5.6 is substantially the same as DR5-107(A) and (B), and Model Rule 1.8(f).

### **Disciplinary Hearing Notes**

The attorney accepted compensation from someone other than his client without the knowledge or consent of his client. Private reprimand. 79 DHC 26.

### **Ethics Opinion Notes**

**CPR 121.** It is permissible for the defendant in an uncontested divorce to pay the plaintiff's attorney.

**CPR 295.** An attorney who refers a client-creditor to a collection agency may accept payment only from the client for legal services rendered to the client.

**CPR 346.** An attorney may represent a defendant employee of a city and accept payment of his fee from the city even though the employee may cross-claim against city.

**RPC 167.** A lawyer may accept compensation from a potentially adverse insurance carrier for representing a minor in the court approval of a personal injury settlement provided the lawyer is able to represent the minor's interests without regard to who is actually paying for his services.

## **Rule 5.7 Settlement of Claims of Multiple Clients**

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or *nolo contendere* pleas unless each client consents after full disclosure, including dis-

closure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**Cross-References.** - See DR5-106(A) and Model Rule 1.8(g).

**Editor's Note.** - No noteworthy difference exists between Rule 5.7 and Model Rule 1.8(g). DR5-106(A) did not contain any provision relating to plea agreements in criminal cases. Otherwise, Rule 5.7 is substantially the same as former DR5-106(A).

### **Ethics Opinion Notes**

**CPR 298.** An attorney may represent a husband and wife in drawing a settlement agreement if both consent after full disclosure and the attorney is satisfied that there is no actual conflict.

## **Rule 5.8 Malpractice Liability**

A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a disputed claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation may be appropriate in connection therewith.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**Cross-References.** - See DR6-102(A) and Model Rule 1.8(h).

**Editor's Note.** - Rule 5.8 is nearly identical to Model Rule 1.8(h).

Rule 5.8 differs only in that it requires a lawyer wishing to settle a malpractice claim with an unrepresented client or former client to advise that person that procuring the advice of independent counsel "may be" appropriate, while the Model Rule requires that such an individual be told that independent representation "is" appropriate under such circumstances. DR6-102(A), read literally, had the effect of totally discouraging not only prospective limitations of liability, but also settlements of actual malpractice claims.

For article, "Malpractice and Ethical Considerations," see 19 N.C. Cent. L.J. 165 (1991).

### **Case Notes**

**Release Exonerating Attorney.** - The attorney violated the Code of Professional Responsibility by having his client sign a release in an attempt to exonerate himself from malpractice. North Carolina State Bar v. Frazier, 62 N.C. App. 172, 302 S.E.2d 648, appeal dismissed, 308 N.C. 677, 303 S.E.2d 546 (1983).

### **Disciplinary Hearing Notes**

Among other things, the attorney attempted to exonerate himself or limit his liability for malpractice by presenting his client with a document entitled "Release" and procuring his client's signature. Eighteen-month suspension. 80 DHC 16.

In addition to other misconduct, the attorney required the client to sign a release form exonerating the attorney from liability for malpractice before turning over the client's files. One-year suspension. 81 DHC 4.

The attorney had a client sign an agreement prospectively limiting the attorney's malpractice liability to the client, at a time when the client was not represented by independent counsel and without advising her to obtain such counsel. One-year suspension, stayed for three years upon conditions. 90 DHC 23.

## Rule 5.9 Representation of Adverse Parties by Related Lawyers

A lawyer related to another lawyer as parent, child, sibling, or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after full disclosure regarding the relationship. This provision shall not be construed to disqualify other lawyers in the affected lawyer's firm.

### Comment

Rule 5.9 applies to related lawyers who are in different firms. Related lawyers in the same firm are governed by Rules 5.1 and 5.10 of this chapter. The disqualification stated in Rule 5.9 is personal and is not imputed to members of firms with whom the lawyers are associated.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**Cross-References.** - See Model Rule 1.8(i).

**Editor's Note.** - Rule 5.9 and Model Rule 1.8(i) are essentially the same. The Code of Professional Responsibility contained no Disciplinary Rule on this subject.

### Ethics Opinion Notes

**RPC 11.** Full disclosure and clients' consent are necessary only when both spouses personally participate as counsel.

## Rule 5.10 Responsibility of Counsel Representing an Organization

A lawyer who represents a corporation or other organization represents and owes allegiance to the entity and shall not permit his or her professional judgment to be compromised in favor of any other entity or individual.

### Comment

A lawyer employed or retained by a corporation or similar entity owes allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interest, and his or her professional judgment should not be influenced by the personal desires of any person or organization. Occasionally a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent him or her in an individual capacity; in such a case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present.

The lawyer representing an entity should keep in mind that confidential information received by the lawyer during the course of the professional relationship is protected by Rule 4 of this chapter and may not be disclosed to persons or entities associated with the entity unless such disclosure is explicitly or impliedly authorized by the client in order to carry out the representation or as otherwise permitted by Rule 4 of this chapter.

The lawyer is also obligated to generally comply with Rule 5.1 of this chapter concerning conflicts of interest.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**Cross-References.** - See Model Rule 1.13.

**Editor's Note.** - Rule 5.10 is a simple statement that a lawyer representing an organization owes his or her loyalty to the entity alone. Model Rule 1.13 sets forth the lawyer's responsibilities more fully. The Code of Professional Responsibility contained no Disciplinary Rule in this area. Ethical Consideration 5-18 did set forth the basic principle now expressed in Rule 5.10.

### Ethics Opinion Notes

**CPR 154.** Because the town attorney owes allegiance to the town and not to particular employees of the town, he must disclose to any inquiring member of the town's board of commissioners the subject of a town business meeting involving town officials and other interested persons despite contrary instructions from the mayor.

**CPR 185.** A staff attorney for a member-owned corporation may provide legal advice to members and nonmembers as long as their interests are not in conflict with those of the corporation.

**CPR 227.** The retained attorney for a religious organization cannot represent citizens who want wills leaving property to the organization.

**CPR 228.** A retained attorney for a religious organization cannot represent employees of the organization in drawing wills.

**CPR 235.** An attorney may not offer to draw wills free for church members who agree to contribute a certain amount to the church.

**CPR 271.** An attorney who drafted a partnership agreement cannot later represent some of the partners against the partnership.

**RPC 97.** Counsel for a condominium association may represent the association against a unit owner.

## Rule 5.11 Imputed Disqualification: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by the Rules of Professional Conduct unless otherwise specifically provided herein.

(b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rule 4 of this chapter that is material to the matter.

(c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) a lawyer remaining in the firm has information protected by Rule 4 of this chapter that is material to the matter.

(d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 5.1 of this chapter.

### Comment

For purposes of the Rules of Professional Conduct, the term "firm" includes lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization, and lawyers in a legal services organization. Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to confidential information concerning the clients they serve.

With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. However, there can be uncertainty as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association with its local affiliates.

Similar questions can also arise with respect to lawyers in legal aid. Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular rule that is involved and on the specific facts of the situation.

Where a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 9.1(a) and (b) of this chapter; where a lawyer represents the government after having served private clients, the situation is governed by Rule 9.1(c) of this chapter. The individual lawyer involved is bound by the rules generally.

Different provisions are thus made for movement of a lawyer from one private firm to another and for movement of a lawyer between a private firm and the government. The government is entitled to protection of its client confidences, and therefore to the protections provided in Rules 4 and 9.1 of this chapter. However, if the more extensive disqualification in Rule 5.11 were applied to former government lawyers, the potential effect on the government would be unduly burdensome. The government deals with all private citizens and organizations, and thus has a much wider circle of adverse legal interests than does any private law firm. In these circumstances, the government's recruitment of lawyers would be seriously impaired if Rule 5.11 were applied to the government. On balance, therefore, the government is better served in the long run by the protections stated in Rule 9.1 of this chapter.

The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by paragraphs (b) and (c).

When lawyers have been associated in a firm but then end their association, however, the problem is more complicated. The fiction that the law firm is the same as a single lawyer is no longer wholly realistic. There are several competing considerations. First, the client previously represented must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule of disqualification should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule of disqualification should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputed disqualification were defined with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

Reconciliation of these competing principles in the past has been attempted under two rubrics. One approach has been to seek *per se* rules of disqualification. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there is a presumption that all confidences known by a partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms.

The other rubric formerly used for dealing with vicarious disqualification is the appearance of impropriety proscribed in Canon 9 of the ABA Model Code of Professional Responsibility. This rubric has a twofold problem. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is question-begging. It therefore has to be recognized that the problem of imputed disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety.

A rule based on a functional analysis is more appropriate for determining the question of vicarious disqualification. Two functions are involved: preserving confidentiality and avoiding positions adverse to a client.

Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions, or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to files of only a limited number of clients and participate in discussion of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients.

Application of paragraphs (b) and (c) depends on a situation's particular facts. In any such inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

Paragraph (b) and (c) operate to disqualify the firm only when the lawyer involved has actual knowledge of information protected by Rule 4 of this chapter. Thus, if a lawyer while with one firm acquired no knowledge of information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict.

Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented.

The second aspect of loyalty to a client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client arising in substantially related matters. This obligation requires abstention from adverse representation by the individual lawyer involved, but does not properly entail abstention of other lawyers through imputed disqualification. Thus, if a lawyer left one firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interests in the same or related matters, so long as the conditions of Rule 5.11(b) and (c) concerning confidentiality have been met.

**History Note:** Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**Cross-References.** - See DR5-105(D) and Model Rule 1.10.

**Editor's Note.** - Rule 5.11 and Model Rule 1.10 are identical.

The only provision dealing with vicarious disqualification in the Code was DR5-105(D). Although that provision purported only to disqualify lawyers associated with lawyers who were disqualified under DR5-105, its application was in practice much broader.

### Ethics Opinion Notes

**CPR 93.** A law firm may not continue to represent a husband charged with his wife's murder after the public defender who had represented a

codefendant who had agreed to testify against the husband in the same case joins the firm.

**CPR 96.** When different attorneys in the same firm are employed to represent conflicting interests in related cases (estate in wrongful death case and criminal defendant in homicide case), both must withdraw.

**CPR 158.** An attorney whose partner represented the wife in domestic litigation which resulted in parties holding real property as co-tenants cannot subsequently represent the husband in a partition proceeding.

**CPR 274.** Attorneys who merely share office space are not automatically disqualified.

**RPC 45.** An attorney whose partner represented the adverse party prior to joining the firm is not disqualified unless the partner acquired confidential information material to the current dispute.

**RPC 49.** Attorneys who own stock in a real estate company may refer clients to the company if such would be in the clients' best interest and there is full disclosure, but the attorneys and other members of their law firm may not close transactions brokered by the real estate firm.

**RPC 55.** A member of the Attorney General's staff may prosecute appeals of adverse Medicaid decisions against the Department of Human Resources, which is represented by another member of the Attorney General's staff.

**RPC 65.** The public defender's office should be considered as a single law firm and staff attorneys may not represent codefendants with conflicting interests unless both consent and can be adequately represented.

**RPC 73.** Opinion clarifies two lines of authority in prior ethics opinions. Where an attorney serves on a governing body, such as a county commission, the attorney is disqualified from representing criminal defendants if a member of the sheriff's department is a prosecuting witness. The attorney's partners are not disqualified.

Where an attorney advises a governing body, such as a county commission, but is not a commissioner herself, and in that capacity represents the sheriff's department relative to criminal matters, the attorney may not represent criminal defendants if a member of the sheriff's department will be a prosecuting witness. In this situation the attorney's partners would also be disqualified from representing the criminal defendants.

## CANON VI

### A Lawyer Should Represent the Client Competently

#### Rule 6 Failing to Act Competently

(a) A lawyer shall not

(1) handle a legal matter which the lawyer knows or should know that he or she is not competent to handle, without associating with him or her a lawyer who is competent to handle it. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation;

(2) handle a legal matter without preparation adequate under the circumstances.

(b) A lawyer shall

(1) keep the client reasonably informed about the status of a matter and promptly comply with reasonable requests for information;

(2) explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation;

(3) act with reasonable diligence and promptness in representing the client.

#### Comment

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to or associate or consult with a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence, and legal drafting are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through neces-

sary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person.

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education.

The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party, and take other reasonable steps that will permit the client to make a decision regarding a serious offer from another party. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be acceptable. Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter.

Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer

should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests and the client's overall requirements as to the character of representation.

Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. Practical exigency may also require a lawyer to act for a client without prior consultation.

In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client and should be obeyed.

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. A lawyer's workload should be controlled so that each matter can be handled adequately.

Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

Unless the relationship is terminated as provided in Rule 2.8 of this chapter, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

Cross-References. See DR6-101 and Model Rules 1.1, 1.3 and 1.4.

**Editor's Note.** - Rule 6(a) is similar to Model Rule 1.1. The three provisions of Rule 6(b) are the same as Model Rules 1.4(a), 1.4(b), and 1.3, respectively.

The first sentence of Rule 6(a)(1) is identical to former DR6-101(A). Rule 6(a)(2) is the same as former DR6-101(A)(2). Where DR6-101(A)(3) formerly admonished a lawyer not to "neglect legal business," Rule 6(b)(3) now requires the lawyer to act with "diligence and promptness."

For article, "Malpractice and Ethical Considerations," see 19 N.C. Cent. L.J. 165 (1991).

### Case Notes

**Failure to Notify Client of Dates.** - The attorney violated the Code of Professional Responsibility by failing to notify the client of court dates. *North Carolina State Bar v. Frazier*, 62 N.C. App. 172, 302 S.E.2d 648, appeal dismissed, 308 N.C. 677, 303 S.E.2d 546 (1983).

**Failure to Seek Appellate Review.** - Appointed counsel who failed to seek appellate review in four criminal cases held in violation of the disciplinary rule. *In re Robinson*, 39 N.C. App. 345, 250 S.E.2d 79 (1979).

**Failure to Perfect Appeal.** - The failure of the respondent attorney to perfect an appeal in a criminal case in which the sentence of death had been imposed was a violation of the disciplinary rule. *In re Dale*, 39 N.C. App. 370, 250 S.E.2d 82, appeal dismissed, 296 N.C. 584, 254 S.E.2d 30 (1979).

A lawyer is ethically bound to advise his client of a plea bargain offer. *State v. Simmons*, 65 N.C. App. 294, 309 S.E.2d 493 (1983).

Cited in *North Carolina State Bar v. Nelson*, 107 N.C. App. 543, 421 S.E.2d 163 (1992).

### Disciplinary Hearing Notes

The attorney failed to perfect an appeal or seek an extension. He did not inform his client of his neglect or return his client's money. Public censure. 77 DHC 13.

The attorney agreed to undertake the task of obtaining access to his client's landlocked real property. Although the attorney failed to initiate any legal action on behalf of his client, he delivered to the client a document purporting to be an order of the superior court dismissing a petition for a cartway across adjoining land. The document was purportedly signed by a judge, and bore the seal and signature of an assistant clerk, but the document was never actually signed by the named individuals nor was it filed. One-year suspension. 81 DHC 1.

The attorney failed to complete representation of a client in a property transaction by failing to have a final title insurance policy issued. Public censure. 80 DHC 11.

The attorney was employed to represent a client's corporation in a civil action. When an action was subsequently filed against his client, the attorney failed to file an answer, causing default judgment to be entered. Although the attorney managed to have the default judgment set aside, his client was barred from asserting its claim due to the attorney's neglect. The attorney was also employed by another client to defend a civil action and prosecute a counterclaim. The attorney failed to file an answer or a counterclaim. Default judgment was entered which the attorney succeeded in having set aside. The attorney admitted neglect in these matters due to alcoholism. Two-year suspension. 80 DHC 13, 14.

The attorney neglected a client's traffic ticket case by failing to appear in court for the hearing on the ticket. The attorney also failed to respond to the client's request for information about the case and failed to respond to the State Bar's inquiries and a subpoena regarding the matter. Three-year suspension. 88 DHC 4.

The attorney neglected his client's case by failing to appear at any of ten depositions scheduled in the matter. The attorney also failed to inform his client of a settlement offer made by the opposing party in the client's case. Public reprimand. 89 DHC 27.

The attorney failed to prosecute civil actions on behalf of three different clients within the applicable statutes of limitation. Two Year Suspension.

sion, one year stayed, on condition the attorney pay two malpractice judgments obtained by the injured clients. 90 DHC 9.

The attorney handled a real estate closing in which the sellers provided additional financing to the buyer. The attorney failed to provide the lender with sufficient information about the secondary financing to permit the lender to make an informed decision regarding whether to proceed with the closing. Public reprimand. 90 DHC 17.

Attorney took \$1500 from the proceeds of the sale of decedent's house as fee and costs for handling the estate. Attorney failed to deposit \$1500 in trust account, failed to administer the estate, and failed to communicate with decedent's daughter who retained him. Five-year suspension, stayed for one year upon certain conditions. 93 DHC 7.

Among other things, attorney neglected several clients' matters, failed to communicate with clients, and neglected three appeals. Five-year suspension, one year stayed upon certain conditions. 93 DHC 22 and 94 DHC 2.

### Ethics Opinion Notes

**RPC 48.** Opinion outlines professional responsibilities of lawyers involved in a law firm dissolution.

**RPC 91.** An attorney employed by the insurer to represent the insured and its own interests may not send the insurer a letter on behalf of the insured demanding settlement within the policy limits.

**RPC 92.** An attorney representing both the insurer and the insured need not surrender to the insured copies of all correspondence concerning the case between herself and the insurer.

**RPC 99.** A lawyer may tack onto an existing title insurance policy if such is disclosed to the client prior to undertaking the representation.

**RPC 111.** An attorney retained by a liability insurer to defend its insured may not advise insured or insurer regarding the plaintiff's offer to limit the insured's liability in exchange for consent to an amendment of the complaint to add a punitive damages claim.

**RPC 112.** An attorney retained by an insurer to defend its insured may not advise insurer or insured regarding the plaintiff's offer to limit the insured's liability in exchange for an admission of liability.

**RPC 129.** Prosecution and defense attorneys may negotiate plea agreements in which appellate and post-conviction rights are waived, except in regard to allegations of ineffective assistance of counsel or prosecutorial misconduct.

**RPC 156.** An attorney who has been retained by an insurance company to represent an insured must inform and advise the insured to the degree necessary for the insured to make informed decisions about future representation when the insurance company pays its entire coverage and is released from further liability or obligation to participate in the defense under the provisions of N.C.G.S. 20-279.21(b)(4).

**RPC 198.** Opinion explores the ethical responsibilities of stand-by defense counsel who are instructed to take over the defense in a capital murder case without an opportunity to prepare.

**RPC 199.** Opinion addresses the ethical responsibilities of a lawyer appointed to represent a criminal defendant in a capital case who, in good faith, believes he lacks the experience and ability to represent the defendant competently.

## CANON VII

### A Lawyer Should Represent the Client Zealously Within the Bounds of the Law

#### Rule 7.1 Representing the Client Zealously

(a) A lawyer shall not intentionally

(1) fail to seek the lawful objectives of his or her client through reasonably available means permitted by law and these rules, except as provided by Rule 7.1(b) below. A lawyer does not violate this rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of the client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process;

(2) fail to carry out a contract of employment entered into with a client for professional services, but the lawyer may withdraw as permitted under Rules 2.8 and 5.1 of this chapter;

(3) prejudice or damage his or her client during the course of the professional relationship, except as required under Rule 7.2(B) of this chapter;

(4) counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client in making a good faith effort to determine the validity, scope, meaning, or application of the law.

(b) In his or her representation of a client, a lawyer may

(1) where permissible, exercise his or her professional judgment to waive or fail to assert a right or position of the client;

(2) refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal;

(3) limit the objectives of the representation if the client consents after full disclosure.

(c) A lawyer shall

(1) abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision as to the plea to be entered, whether to waive jury trial, and whether the client will testify;

(2) consult with the client regarding the relevant limitations on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

#### Comment

Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.

Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of

popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, employment may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent.

An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 6 of this chapter, or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.

A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of the legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing except where permitted by Rule 4 of this chapter. However, the lawyer is required to avoid furthering the illicit purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required.

Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

Paragraph (a)(4) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability. Paragraph (a)(4) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (a)(4) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

**History Note:** Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**Cross-References.** - See DR7-101 and Model Rule 1.2.

**Editor's Note.** - Rule 7.1 is an amalgam of former DR7-101 and Model Rule 1.2.

Rules 7.1(a)(1), (2) and (3) are taken from DR7-101(A). Rule 7.1(a)(4) comes from Model Rule 1.2(d). Rules 7.1(b)(1) and (2) are taken from DR7-101(B), Rule 7.1(b)(3) is derived from Model Rule 1.2(c).

Rules 7.1(c)(1) and (c)(2) relate to Model Rules 1.2(a) and (c), respectively.

## Case Notes

**Creation of Attorney-Client Relationship.** - An express verbal agreement is not necessary to establish an attorney-client relationship, but such may be implied from the conduct of the parties, even in the absence of the payment of fees or the lack of a formal contract. *Broyhill v. Ay-*

*cock & Spence*, 102 N.C. App. 382, 402 S.E.2d 167, aff'd, 330 N.C. 438, 410 S.E.2d 392 (1991).

**Question of Attorney-Client Relationship.** - A genuine issue of material fact was presented as to whether there was an attorney-client relationship where defendant introduced a deposition in which he denied that he had ever represented plaintiff in any transaction and stated that, at one point, plaintiff claimed to defendant that he represented himself, and where plaintiff, on the other hand, presented his affidavit stating that defendant did represent plaintiff in the transaction at issue. *Broyhill v. Aycock & Spence*, 102 N.C. App. 382, 402 S.E.2d 167, aff'd, 330 N.C. 438, 410 S.E.2d 392 (1991).

An attorney may be held liable for negligence by a non-client third party in the absence of privity of contract. *Broyhill v. Aycock & Spence*, 102 N.C. App. 382, 402 S.E.2d 167, aff'd, 330 N.C. 438, 410 S.E.2d 392 (1991).

Prosecutor's questioning of capital murder defendant's mother about locks placed on the outside of defendant's bedroom door was highly prejudicial and of no probative value; however, such error was harmless where the question of defendant's guilt was strong, the trial court properly sustained defendant's objections to the questions, and the mother testified that she was not afraid of her son. *State v. Payne*, 328 N.C. 377, 402 S.E.2d 582 (1991).

**Interference with Prosecuting Witness.** - Immediately prior to trial, the defense attorney negotiated an agreement between the prosecuting witness and the accused, which called for his client to pay for damages to a car and a hospital bill in return for a promise not to press charges. He also told the witness she could leave the courthouse because her testimony would not be needed. The attorney's efforts on behalf of his client went far beyond representing the client "zealously within the bounds of the law" and constituted a direct attempt to interfere with a State's witness who was under subpoena to testify in a case. *State v. Rogers*, 68 N.C. App. 358, 315 S.E.2d 492, cert. denied, 311 N.C. 767, 319 S.E.2d 284 (1984), appeal dismissed, 469 U.S. 1101, 105 S. Ct. 769, 83 L. Ed. 2d 766 (1985).

Cited in *North Carolina State Bar v. Nelson*, 107 N.C. App. 543, 421 S.E.2d 163 (1992).

## Disciplinary Hearing Notes

Attorney took \$1500 from the proceeds of the sale of decedent's house as fee and costs for handling the estate. Attorney failed to deposit \$1500 in his trust account, failed to administer the estate, and failed to communicate with the decedent's daughter who had retained him. Five-year suspension, stayed for one year upon certain conditions. 93 DHC 7.

## Ethics Opinion Notes

**CPR 285.** An attorney may advise his client in custody litigation of the legal consequences and practical effects of her decision to move into an apartment leased by her boyfriend.

**CPR 314.** An attorney who believes his or her client is not competent to make a will may not prepare or preside over the execution of a will for that client.

**RPC 44.** A closing attorney must follow the lender's closing instruction that closing documents be recorded prior to disbursement.

**RPC 48.** Opinion outlines professional responsibilities of lawyers involved in a law firm dissolution.

**RPC 99.** A lawyer may tack onto an existing title insurance policy if such is disclosed to the client prior to undertaking the representation.

**RPC 103.** A lawyer for the insured and the insurer may not enter voluntary dismissal of the insured's counterclaim without the insured's consent.

**RPC 118.** An attorney should not waive the statute of limitations without the client's consent.

**RPC 129.** Prosecutors and defense attorneys may negotiate plea agreements in which appellate and post-conviction rights are waived, except

in regard to allegations of ineffective assistance of counsel or prosecutorial misconduct.

**RPC 145.** A lawyer may not include language in an employment agreement that divests the client of her exclusive authority to settle a civil case.

**RPC 163.** A lawyer may seek the appointment of an independent guardian ad litem for a child whose guardian has an obvious conflict of interest in fulfilling his fiduciary duties to the child.

**RPC 172.** A lawyer retained by an insurer to defend its insured is not required to represent the insured on a compulsory counterclaim provided the lawyer apprises the insured of the counter claim in sufficient time to retain separate counsel.

## Rule 7.2 Representing the Client Within the Bounds of the Law

(a) In representing a client, a lawyer shall not

(1) file a suit, assert a position, conduct a defense, controvert an issue, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would be frivolous or would serve merely to harass or maliciously injure another;

(2) knowingly advance a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend as to require that every element of the case against the client be established;

(3) conceal or knowingly fail to disclose that which the lawyer is required by law to reveal;

(4) knowingly make a false statement of law or fact;

(5) knowingly use perjured testimony or false evidence;

(6) participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false;

(7) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value;

(8) counsel or assist the client in conduct that the lawyer knows to be illegal or fraudulent;

(9) knowingly engage in other illegal conduct or conduct contrary to a disciplinary rule;

(b) A lawyer who receives information clearly establishing that

(1) his or her client intends to or has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and, if the client refuses or is unable to do so, the lawyer shall discontinue representation of the client in that matter; and if the representation involves litigation, the lawyer shall (if applicable rules require) request the tribunal to permit him or her to withdraw, but without necessarily revealing the reason for wishing to withdraw;

(2) a person other than his or her client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

### Comment

The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. However, an assertion purporting to be of the

lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 7.1(a)(4) of this chapter not to counsel a client to commit or assist the client in committing a fraud applies in litigation.

When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes. If the false evidence is introduced before the lawyer discovers its falsity, the lawyer shall reveal the fraud to the tribunal.

When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must seek to withdraw.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**Cross-References.** - See DR7-102 and Model Rules 3.1, 3.2 and 3.3.

**Editor's Note.** - Rule 7.2 incorporates the provisions of former DR7-102 and addresses one additional matter. Rule 7.2(a)(7) prohibits a lawyer from obstructing another party's access to evidence.

As opposed to Model Rule 3.3, which would require a lawyer to disclose his client's perjury to the court, Rule 7.2(b) merely requires the lawyer to seek to withdraw if his client cannot be persuaded to correct his own perjured testimony.

For article on the criminal defendant who proposes or commits perjury, see 17 N.C. Cent. L.J. 157 (1988).

### Case Notes

It is not improper for an attorney to prepare his witness for trial, to explain the applicable law in any given situation and to go over before trial the attorney's questions and the witness' answers so that the witness will be ready for his appearance in court, will be more at ease because he knows what to expect, and will give his testimony in the most effective manner he can. Such preparation is the mark of a good trial lawyer, and is to be commended because it promotes more efficient administration of justice and saves court time. Nothing improper occurs so long as the attorney prepares the witness to give the witness' testimony at trial and not the testimony that the attorney has placed in the witness' mouth or false or perjured testimony. *State v. McCormick*, 298 N.C. 788, 259 S.E.2d 880 (1979).

Intentionally encouraging the concealment of material facts relevant to the identity of the driver in a driving under the influence prosecution is prejudicial to the administration of justice. Such conduct raises serious doubts as to the attorney's desire to bring about a just result in such a prosecution and adversely reflects on the attorney's fitness to practice law. *North Carolina State Bar v. Graves*, 50 N.C. App. 450, 274 S.E.2d 396 (1981).

Where an attorney learns, prior to trial, that his client intends to commit perjury or participate in the perpetration of a fraud upon the court he must withdraw from representation of the client, seeking leave of the court, if necessary. The right of a client to effective counsel in any case (civil or criminal) does not include the right to compel counsel to knowingly assist or participate in the commission of perjury or the creation or presentation of false evidence. In *re Palmer*, 296 N.C. 638, 252 S.E.2d 784 (1979).

**Failure to Inform Court of Opposing Party's Address.** - An attorney clearly engaged in conduct involving fraud, dishonesty, deceit and misrepresentation when, in a divorce action, she failed to inform the court of a letter which contained the opposing party's return address, while at the same time presenting to the court an affidavit she had drafted in which

her client swore that her husband's whereabouts were unknown and could not with due diligence be ascertained. *North Carolina State Bar v. Wilson*, 74 N.C. App. 777, 330 S.E.2d 280 (1985).

**Interjection of Unsupported Knowledge and Belief.** - Counsel may not, by agreement or cross-examination, place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs and personal opinions not supported by the evidence. *State v. Locklear*, 294 N.C. 210, 241 S.E.2d 65 (1978).

### Disciplinary Hearing Notes

The attorney knowingly used perjured testimony in an attempt to receive a set-off for federal estate taxes due; failed to keep adequate records and accounts for an incompetent client; perpetrated a fraud upon a Florida court by false testimony; and failed to give a complete and timely accounting to his incompetent client's personal representative. Disbarred. 81 DHC 2.

The attorney filed pleadings which were not well grounded in fact or law and falsely certified to the court that he had served the pleadings on opposing counsel. The client later discharged the attorney, who refused to withdraw, refused to return the client's file, and insisted on charging a contingent fee, rather than the reasonable value of his services. Two-year suspension, with reinstatement conditioned on the attorney passing the bar examination. 90 DHC 22.

The attorney misrepresented to an administrative law judge and a state agency that he had been advised by the former chief administrative law judge to take certain actions on behalf of his client when, in fact, the attorney had not discussed that client's case with the former judge. Censure. 92 DHC 3.

### Ethics Opinion Notes

**CPR 92.** An attorney who knows that criminal clients gave arresting officers fictitious names should call upon the clients to disclose their true identities to the court and, if they refuse, seek to withdraw.

**CPR 110.** An attorney may not advise client to seek a Dominican divorce knowing that the client will return immediately to North Carolina and continue residence.

**CPR 122.** An attorney representing the defendant in divorce action, when advised by the client that parties have not been separated a year, must file an answer denying the allegation of separation even though the client does not wish to contest the divorce.

**CPR 267.** An attorney may prepare a contractual agreement regarding property for a man and woman who contemplate living together without marriage so long as sexual intercourse is not part of the consideration supporting the agreement.

**CPR 284.** An attorney may seek alimony for a wife although he has evidence of the wife's adultery so long as he does not have to offer perjured testimony or other false evidence.

**CPR 321.** It is improper for an attorney to file motions and pleadings for the mere purpose of delay.

**CPR 351.** An attorney seeking a restraining order is not required to inform a judge that he has previously been denied relief by another judge if the court does not ask. However, good professional practice would dictate that the court be advised.

**RPC 33.** If an attorney's client testifies falsely regarding a material matter, such as his or her name or criminal record, the attorney must call upon the client to correct the testimony. If the client refuses, the attorney must seek to withdraw in accordance with the rules of the tribunal.

**RPC 181.** A lawyer may not seek to disqualify another lawyer from representing the opposing party by instructing a client to consult with the other lawyer about the subject matter of the representation when the client has no intention of retaining the other lawyer.

**RPC 182.** A lawyer must disclose to an adverse party with whom the lawyer is negotiating a settlement that the lawyer's client had died.

## Rule 7.3 Special Responsibilities of a Prosecutor

The prosecutor in a criminal or quasi-criminal case shall

(1) refrain from prosecuting a charge that he or she knows is not supported by probable cause, unless otherwise directed by statutory mandate;

(2) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(3) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(4) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when he or she is relieved of this responsibility by a protective order of the tribunal; and

(5) exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with him or her from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 7.7 of this chapter.

### Comment

The responsibility of a public prosecutor, which for these purposes includes a government lawyer having a prosecutorial role, differs from that of the usual advocate; the prosecutor's duty is to seek justice, not merely to convict. This special duty exists because

(1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of government powers, such as in the selection of cases to prosecute;

(2) during trial the prosecutor is not only an advocate but he or she also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and

(3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice; the prosecutor should make timely disclosure to the defense of available evidence known to him or her that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he or she believes it will damage the prosecutor's case or aid the accused.

Paragraph (3) does not apply to an accused appearing *pro se* with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and silence.

The exception in paragraph (4) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**Cross-References.** - See DR7-103 and Model Rule 3.8.

**Editor's Note.** - Rule 7.3 is identical to Model Rule 3.8 except that Rule 7.3 expressly applies to prosecutors in quasi-criminal proceedings such as attorney disciplinary proceedings.

Rule 7.3 embraces former DR7-103. However, the Rule greatly expands the special responsibilities of a prosecutor by requiring the prosecutor to help insure the accused's right to counsel, by prohibiting the prosecutor from seeking from the unrepresented accused a waiver of important pretrial rights, and by requiring the prosecutor to exercise care to prevent persons under his supervision from making the sort of extrajudicial comments prohibited by Rule 7.7.

For article, "Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger," see 65 N.C.L. Rev. 693 (1987).

Ethics Opinion Notes

**RPC 197.** A prosecutor must notify defense counsel, jail officials, or other appropriate persons to avoid the unnecessary detention of a criminal defendant after the charges against the defendant have been dismissed by the prosecutor.

Rule 7.4 Communicating with One of Adverse Interest

During the course of his or her representation of a client, a lawyer shall not

- (1) communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter unless the lawyer has the consent of the other lawyer or is authorized by law to do so;
- (2) give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are, or have a reasonable possibility of being, in conflict with the interests of his or her client;
- (3) in dealing on behalf of a client with a person who is not represented by counsel, state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Comment

This rule does not prohibit a lawyer who does not have a client relative to a particular matter from consulting with a person or entity who, though represented concerning the matter, seeks another opinion as to his or her legal situation. A lawyer from whom such an opinion is sought should, but is not required to, inform the first lawyer of his or her participation and advice.

This rule does not prohibit communication with a party, or an employee of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

After a lawyer for a party has been notified that an adverse or potentially adverse organization is represented by counsel in a particular matter, this rule would prohibit communications by the lawyer concerning the matter with persons having managerial responsibility on behalf of the organization, and with any other employee whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an employee of the organization is represented in the matter by his or her own counsel, the consent of that counsel to a communication would be sufficient for purposes of this rule.

This rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.

History Note: Statutory Authority G.S. 84-23  
Readopted Effective December 8, 1994

Cross-References. - See DR7-104 and Model Rules 4.2 and 4.3.

Editor's Note. - Rule 7.4 is an amalgam of former DR7-104 and Model Rules 4.2 and 4.3.

Case Notes

This rule does not prevent a person in custody from making inculpatory statements upon waiver of the right to counsel. *State v. Romero*, 56

N.C. App. 48, 286 S.E.2d 903, disc. rev. denied, 306 N.C. 391, 294 S.E.2d 218 (1982).  
Interview of Plaintiff's Physician by Defense Attorneys. Defense attorneys may not interview a plaintiff's treating physician privately without the plaintiff's express consent.  
Defendant must use the statutorily recognized methods of discovery set out in 1A-1, Rule 26 of the Rules of Civil Procedure. *Crist v. Moffatt*, 326 N.C. 326, 389 S.E.2d 41 (1990).  
Applied in *State v. Thompson*, 332 N.C. 204, 420 S.E.2d 395 (1992).  
Quoted in *McCallum v. CSX Transp., Inc.*, 149 F.R.D. 104 (M.D.N.C. 1993).

Disciplinary Hearing Notes

During an authorized visit with an adverse party whom attorney knew was represented by another attorney, the attorney exceeded his authority by discussing an aspect of the matter which he did not have the specific permission of opposing counsel to discuss. Private reprimand. 79 DHC 23.

Ethics Opinion Notes

**CPR 2.** An attorney generally does not need the consent of the adverse party to talk to witnesses.  
**CPR 121.** If a defendant is not represented, the attorney for the plaintiff in a divorce action may send the defendant a copy of the complaint, and a summons for acceptance of service; but may not send a prepared answer or a consent order.

**CPR 138.** An attorney representing a party may not send copies of motions to another party he knows has counsel.

**CPR 296.** The attorney for the plaintiff in a domestic case may not make available to the defendant a form waiving the right to answer and other rights, nor may he allow his client to provide such a form to the defendant.

**RPC 15.** An attorney may interview a person with adverse interest who is unrepresented and make a demand or propose a settlement.

**RPC 30.** A district attorney may not communicate or cause another to communicate with a represented defendant without the defense lawyer's consent.

**RPC 39.** An attorney may not communicate settlement demands directly to an insurance company which has employed counsel to represent its insured unless that lawyer consents.

**RPC 61.** A defense attorney may interview a child who is the prosecuting witness in a molestation case without the knowledge or consent of the district attorney.

**RPC 67.** An attorney generally may interview a rank and file employee of an adverse corporate party without the knowledge or consent of the corporate party or its counsel.

**RPC 81.** A lawyer may interview an unrepresented former employee of an adverse corporate party without the permission of the corporation's lawyer.

**RPC 87.** A lawyer wishing to interview a witness who is not a party, but who is represented by counsel, must obtain the consent of the witness' lawyer.

**RPC 93.** Opinion concerns several situations in which an attorney who represents a criminal defendant wishes to interview other individuals who are represented by attorneys who will not agree to permit the attorney to interview their clients.

**RPC 110.** An attorney employed by an insurer to defend in the name of the defendant pursuant to underinsured motorist coverage may not communicate with that individual without the consent of another attorney employed to represent that individual by her liability insurer.

**RPC 119.** An attorney may acquiesce in a client's communication with an opposing party who is represented without the other attorney's consent, but may not actively encourage or participate in such communication.

**RPC 128.** A lawyer may not communicate with an adverse corporate party's house counsel, who appears in the case as a corporate manager, without the consent of the corporation's independent counsel.

**RPC 132.** A lawyer for a party adverse to the government may freely communicate with government officials concerning the matter until notified that the government is represented in the matter.

**RPC 162.** A lawyer may not communicate with the opposing party's nonparty treating physician about the physician's treatment of the opposing party unless the opposing party consents.

**RPC 165.** An attorney may provide a confession of judgment to an unrepresented adverse party for execution by that party so long as the lawyer does not undertake to advise the adverse party or feign disinterestedness.

**RPC 180.** A lawyer may not passively listen while the opposing party's nonparty treating physician comments on his or her treatment of the opposing party unless the opposing party consents.

**RPC 184.** The lawyer for opposing party may communicate directly with the pathologist who performed an autopsy on plaintiff's decedent without the consent of the personal representative of the decedent's estate.

**RPC 189.** The district attorney's staff may not give legal advice about pleas to an unrepresented person charged with a traffic infraction.

**RPC 193.** The lawyer for the plaintiffs in a personal injury action arising out of a motor vehicle accident may interview the unrepresented defendant even though the uninsured motorist insurer, which has elected to defend the claim in the name of the defendant, is represented by a lawyer in the matter.

**RPC 194.** In a letter to an unrepresented prospective defendant in a personal injury action, the plaintiff's lawyer may not give legal advice nor may he create the impression that he is concerned about or protecting the interests of the unrepresented prospective defendant.

## Rule 7.5 Threatening Criminal Prosecution

A lawyer shall not present, participate in presenting, or threaten to present criminal charges primarily to obtain an advantage in a civil matter.

### Comment

The criminal courts are intended for the use of the state in trying persons accused of violating society's penal laws. They are not intended to provide forums for the adjustment of civil disputes. A lawyer should never institute or threaten to institute criminal proceedings to gain a tactical advantage in a civil dispute.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

Cross-References. - See DR7-105.

**Editor's Note.** - Rule 7.5 is substantially the same as former DR7-105. Rule 7.5 is somewhat more restrictive in that it prohibits conduct "primarily" intended to obtain an advantage in a civil matter. DR7-105's prohibition ran only to conduct which was "solely" intended to obtain the civil advantage. There is no correlative provision in the Model Rules.

### Disciplinary Hearing Notes

The attorney attempted to coerce a favorable settlement in a civil case by threatening to expose the adverse party's alleged criminal conduct in an unrelated matter. Public censure. 86 DHC 6.

## Rule 7.6 Trial Conduct

(a) A lawyer shall not disregard or advise his or her client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take appropriate steps in good faith to test the validity of such rule or ruling.

(b) In presenting a matter to a tribunal, a lawyer shall disclose

(1) legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of his or her client and which is not disclosed by opposing counsel;

(2) unless privileged or irrelevant, the identities of the clients the lawyer represents and the persons who employed the lawyer;

(c) In appearing in his or her professional capacity before a tribunal, a lawyer shall not

(1) state or allude to any matter that the lawyer has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence;

(2) ask any question that the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person;

(3) assert his or her personal knowledge of the facts in issue, except when testifying as a witness;

(4) assert his or her personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused; but the lawyer may argue, on his or her analysis of the evidence, for any position or conclusion with respect to the matters stated herein;

(5) fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his or her intent not to comply;

(6) engage in undignified or discourteous conduct which is degrading to a tribunal;

(7) intentionally or habitually violate any established rule of procedure or evidence;

(8) engage in conduct intended to disrupt a tribunal.

### Comment

The complexity of law often makes it difficult for a tribunal to be fully informed unless the pertinent law is presented by the lawyers in the cause. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. The adversary system contemplates that each lawyer will present and argue the existing law in the light most favorable to his client. Where a lawyer knows of legal authority in the controlling jurisdiction directly adverse to the position of his or her client, the lawyer should inform the tribunal of its existence unless his or her adversary has done so; but, having made such disclosure, the lawyer may challenge its soundness in whole or in part.

In order to bring about just and informed decisions, evidentiary and procedural rules have been established by tribunals to permit the inclusion of relevant evidence and argument and the exclusion of all other considerations. The expression by a lawyer of his or her personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused is not a proper subject for argument to the trier of fact. It is improper as to factual matters because admissible evidence possessed by a lawyer should be presented only as sworn testimony. It is improper as to all other matters because, were the rule otherwise, the silence of a lawyer on a given occasion could be construed unfavorably to his or her client. However, a lawyer may argue, on his or her analysis of the evidence, for any position or conclusion with respect to any of the foregoing matters.

Rules of evidence and procedure are designed to lead to just decisions and are part of the framework of the law. Thus, while a lawyer may take steps in good faith and within the framework of the law to test the validity of rules, the lawyer is not justified in consciously violating such rules and he or she should be diligent in his or her efforts to guard against unintentional violation of them. As examples, a lawyer should subscribe to or verify only those pleadings that the lawyer believes are in compliance with applicable law and rules; a lawyer should not make any prefatory statement before a tribunal in regard to the purported facts of the case on trial unless the lawyer believes that his or her statement will be supported

by admissible evidence; a lawyer should not ask a witness a question solely for the purpose of harassing or embarrassing the witness; and a lawyer should not by subterfuge put before a jury matters which it cannot properly consider.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**Cross-References.** - See DR7-106 and Model Rule 3.4.

**Editor's Note.** - Rule 7.6 is a restatement of former DR7-106 with an additional prohibition against engaging in conduct intended to disrupt a tribunal.

Model Rule 3.4 generally relates to Rule 7.6. Two provisions from the Model Rule, 3.4(d) concerning discovery abuses, and 3.4(f) concerning requests that non-client witnesses refrain from giving information to another party, do not appear in Rule 7.6.

Model Rule 3.4(f) does appear in Rule 7.9.

## Case Notes

Ethical transgressions by trial counsel do not always constitute legal error. *State v. Sanders*, 303 N.C. 608, 281 S.E.2d 7, cert. denied, 454 U.S. 973, 102 S. Ct. 523, 70 L.Ed.2d 392 (1981).

It is improper for a lawyer to assert his opinion that a witness is lying. He can argue to a jury that they should not believe a witness, but he should not call him a liar. A cross-examination by which the prosecutor places before the jury inadmissible and prejudicial matter is highly improper and, if knowingly done, unethical. *State v. Locklear*, 294 N.C. 210, 241 S.E.2d 65 (1978).

**Argument That Testifying Officers Could Be Prosecuted If They Lied.** - A prosecutor who, in closing, made arguments based on matters outside the record by suggesting that the officers who testified against the defendant could be prosecuted for perjury and fired from their jobs, and lose their pensions if they lied, placed the jurors in the moral dilemma of either convicting the defendant or, in the alternative, causing the officers to suffer the grievous penalties suggested by the prosecutor. The argument was, therefore, improper and the defendant was entitled to a new trial. *State v. Potter*, 69 N.C. App. 199, 316 S.E.2d 359, disc. rev. denied, 312 N.C. 624, 323 S.E.2d 925 (1984).

**Argument Containing Personal Belief.** - The defendant contended on appeal that the prosecutor's argument to the jury contained the prosecutor's personal belief as to the defendant's guilt in violation of the Code. The court held that the statements could be interpreted in several ways, but that even if the prosecutor's argument had contained such a statement, the violation did not entitle the defendant to a new trial. *State v. Sanders*, 303 N.C. 608, 281 S.E.2d 7, cert. denied, 454 U.S. 973, 102 S. Ct. 523, 70 L. Ed. 2d 392 (1981).

Counsel may not, by argument or cross-examination, place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs and personal opinions not supported by the evidence. *State v. Locklear*, 294 N.C. 210, 241 S.E.2d 65 (1978).

The intentional act of soliciting someone to disrupt a criminal trial by an attorney representing a defendant was not a felony, but would support an order of disbarment. *In re Paul*, 84 N.C. App. 491, 353 S.E.2d 254, cert. denied, 319 N.C. 673, 356 S.E.2d 779 (1987), cert. denied, 484 U.S. 1004, 108 S. Ct. 694, 98 L. Ed. 2d 646 (1988).

**Judge's Statements as to Applicability of Rule.** - The defendant assigned as error the judge's statements to the jury claiming that DR7-106 is applicable to statements by a judge. The court held that the defendant was not prejudiced by the statements. *State v. Black*, 308 N.C. 736, 303 S.E.2d 804 (1983).

## Rule 7.7 Trial Publicity

(a) A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by

means of public communication where there is a reasonable likelihood of interference with a fair jury proceeding. A lawyer may state

(1) information contained in a public record;

(2) that the investigation is in progress;

(3) the general scope of the investigation including a description of the offense, and, if permitted by law, the identity of the victim;

(4) a request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto;

(5) a warning to the public of any danger.

(b) A lawyer associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until conclusion of jury proceedings, make or cause another person to make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if there is a reasonable likelihood of interference with a fair jury proceeding and the statement relates to

(1) the character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused;

(2) the possibility of a plea of guilty to the offense charged or to a lesser offense;

(3) the existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement;

(4) the performance or results of any examination or test or the refusal or failure of the accused to submit to any examination or test;

(5) the identity, testimony, or credibility of a prospective witness;

(6) any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

(c) Rule 7.7(b) above does not preclude a lawyer during such period from announcing

(1) the name, age, residence, occupation, and family status of the accused;

(2) if the accused has not been apprehended, any information necessary to aid in his or her apprehension or to warn the public of any dangers he or she may present;

(3) a request for assistance in obtaining evidence;

(4) the identity of the victim of the crime;

(5) the fact, time and place of arrest, resistance, pursuit, and use of weapons;

(6) the identity of investigating and arresting officers or agencies and the length of the investigation;

(7) the nature, substance, or text of the charge;

(8) quotations from or references to public records of the court in the case;

(9) the scheduling or result of any step in the judicial proceedings;

(10) that the accused denies the charges made against him or her.

(d) A lawyer shall not make or cause another person to make an extrajudicial statement regarding a civil jury proceeding (or an administrative proceeding from which or ancillary to which the right to a civil jury trial exists) that a reasonable person would expect to be disseminated by means of public communication and that the lawyer knows or reasonably should know will have a reasonable likelihood of materially prejudicing such jury proceeding and impairing the integrity of the judicial process. An extrajudicial statement will likely have such an effect when the statement relates to

(1) the character, credibility, reputation, or criminal record (including arrests, indictments, or other charges of crime, whether past, present, or forthcoming) of a party, witness, prospective party, or witness or the expected testimony of the aforesaid unless such information would be clearly admissible at the proceeding;

(2) a companion criminal case or proceeding in which there is a common core of facts that could result in incarceration, the possibility of a guilty plea to the offense, or the existence or contents of any confession, admission, or statement given by a party, witness, or prospec-

tive party or witness or that person's refusal or failure to make a statement unless such information would be clearly admissible at the proceeding;

(3) the performance or results of any examination or test, or the refusal of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented at trial unless such information would be clearly admissible at the proceeding;

(4) any opinion as to the guilt or innocence of a party, witness, or prospective party or witness in a companion criminal case or proceeding in which there is a common core of facts that could result in incarceration;

(5) the details of a settlement offer or the failure of the other party to accept a settlement offer;

(6) information the lawyer knows or reasonably should know is likely to be inadmissible at trial and would, if disclosed, create a substantial risk of prejudicing an impartial proceeding;

(7) any statement of law or fact which the lawyer knows to be false and which would, if stated, create a substantial risk of prejudicing an impartial proceeding;

(8) any opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.

(e) Any word, phrase, or sentence in paragraph (a) above which may be found by a court to be in violation of the Constitutions of the United States or North Carolina shall be deemed severable from all other words, phrases, and sentences of that paragraph.

(f) A lawyer involved in the investigation or litigation of a civil jury matter may state without elaboration

(1) the general nature of the claim or defense;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved, and, except when prohibited by law, the identity of the persons involved;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is a reason to believe that such danger exists; and

(7) in a companion criminal case

(A) the name, age, residence, occupation, and family status of the accused;

(B) if the accused has not been apprehended, any information necessary to aid in his or her apprehension or to warn the public of any dangers he or she may present;

(C) a request for assistance in obtaining evidence;

(D) the identity of the victim of the crime;

(E) the fact, time, and place of arrest, resistance, pursuit, and use of weapons;

(F) the identity of investigating and arresting officers or agencies and the length of the investigation;

(G) the nature, substance, or text of the charge;

(H) quotations from or references to public records of the court in the case;

(I) the scheduling or result of any step in the judicial proceedings.

(g) The foregoing provisions of Rule 7.7 do not preclude a lawyer from replying to charges of misconduct publicly made against the lawyer or from participating in the proceedings of legislative, administrative, or other investigative bodies.

(h) A lawyer shall exercise reasonable care to prevent his or her employees and associates from making an extrajudicial statement that the lawyer would be prohibited from making under this rule.

(i) A lawyer, in the representation of a client, shall not knowingly make a false statement of fact, state or allude to any matter or any person not reasonably related to the client's case, or use the public record or the processes of the courts to knowingly convey false statements of fact or other information regarding any matter or any person not reasonably related to the client's case.

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### Comment

It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**Cross-References.** - See DR7-107 and Model Rule 3.6.

**Editor's Note.** - Rule 7.7 is identical to former DR7-107. Model Rule 3.6 is similar to Rule 7.7.

### Ethics Opinion Notes

**CPR 4.** The rule restricting pretrial publicity does not apply when the case is on appeal.

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## Rule 7.8 Communication with or Investigation of Jurors

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(a) Before the trial of a case a lawyer connected therewith shall not communicate with or cause another to communicate with anyone the lawyer knows to be a member of the venire from which the jury will be selected for the trial of the case.

(b) During the trial of a case

(1) a lawyer connected therewith shall not communicate with or cause another to communicate with any member of the jury;

(2) a lawyer who is not connected therewith shall not communicate with or cause another to communicate with a juror concerning the case.

(c) This rule does not prohibit a lawyer from communicating with veniremen or jurors in the course of official proceedings.

(d) After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his or her actions in future jury service.

(e) A lawyer shall not conduct or cause, by financial support or otherwise, another to conduct a vexatious or harassing investigation of either a venireman or a juror.

(f) All restrictions imposed by this rule upon a lawyer also apply to communications with or investigations of members of the family of a venireman or a juror.

(g) A lawyer shall reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of his or her family, of which the lawyer has knowledge.

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## Comment

To safeguard the impartiality that is essential to the judicial process, veniremen and jurors should be protected against extraneous influences. When impartiality is present, public confidence in the judicial system is enhanced. There should be no extrajudicial communication with veniremen prior to trial or with jurors during trial by or on behalf of a lawyer connected with the case. Furthermore, a lawyer who is not connected with the case should not communicate with or cause another to communicate with a venireman or a juror about the case. After the trial, communication by a lawyer with a juror is permitted so long as he or she refrains from asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases. Were a lawyer to be prohibited from communicating after trial with a juror, the lawyer could not ascertain if the verdict might be subject to legal challenge, in which event the invalidity of a verdict might go undetected. When an extrajudicial communication by a lawyer with a juror is permitted by law, it should be made considerably and with deference to the personal feelings of the juror.

Vexatious or harassing investigations of veniremen or jurors seriously impair the effectiveness of our jury system. For this reason, a lawyer or anyone on his or her behalf who conducts an investigation of veniremen or jurors should act with circumspection and restraint.

Communications with or investigations of members of families of veniremen or jurors by a lawyer or by anyone on his or her behalf are subject to the restrictions imposed upon the lawyer with respect to his or her communications with or investigations of veniremen and jurors.

Because of his or her duty to aid in preserving the integrity of the jury system, a lawyer who learns of improper conduct by or towards a venireman, a juror or a member of the family of either should make a prompt report to the court regarding such conduct.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

Cross-References. - See DR7-108 and Model Rule 3.5.

Editor's Note. - Rule 7.8 is identical to former DR7-108. Model Rule 3.5 is the correlative provision.

## Case Notes

The trial judge did not abuse his discretion in removing a juror and substituting an alternate juror when the original juror contacted defense counsel at his home during the weekend recess and persisted in discussing matters of a personal nature, including counsel's marital status. Although there was no evidence that any matter which related to the trial of the defendant was discussed during the conversation, the exercise of discretion by the trial judge served to safeguard the trial of the defendant from even the appearance of impropriety. *State v. Price*, 301 N.C. 437, 272 S.E.2d 103 (1980).

Quoted in *State v. Bunch*, 104 N.C. App. 106, 408 S.E.2d 191 (1991).

## Disciplinary Hearing Notes

Attorney illegally contacted a juror to discuss a case. Three-year suspension. 78 DHC 5.

## Ethics Opinion Notes

CPR 337. After a jury trial, an attorney may communicate with jurors as to why they decided issues as they did and their opinions of the attorney's performance, unless such is prohibited by court rule.

## Rule 7.9 Contact with Witnesses

A lawyer shall not

(a) advise or cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making him or her unavailable as a witness therein;

(b) pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his or her testimony or the out-

come of the case, but a lawyer may advance, guarantee, or acquiesce in the payment of

(1) expenses reasonably incurred by a witness in attending or testifying;

(2) reasonable compensation to a witness for his or her loss of time in attending or testifying;

(3) a reasonable fee for the professional services of an expert witness.

(c) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(d) request a person other than a client to refrain from voluntarily giving relevant information to another party unless

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

## Comment

Witnesses should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise. A lawyer should not pay or agree to pay a nonexpert witness an amount in excess of reimbursement for expenses and financial loss incident to his or her being a witness; however, a lawyer may pay or agree to pay an expert witness a reasonable fee for his or her services as an expert. But in no event should a lawyer pay or agree to pay a contingent fee to any witness. A lawyer should exercise reasonable diligence to see that his or her client and lay associates conform to these standards.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

Cross-References. - See DR7-109 and Model Rules 3.4 and 3.5.

Editor's Note. - Rule 7.9 incorporated former DR7-109 and Model Rules 3.4(b) and (f).

## Case Notes

Interference with Prosecuting Witness. - Immediately prior to trial, the defense attorney negotiated an agreement between the prosecuting witness and the accused which called for his client to pay for damages to the witness' car and the witness' hospital bills in return for a promise not to press charges. He also told the witness she could leave the courthouse because her testimony would not be needed. The defendant attorney's efforts on behalf of his client went far beyond representing the client "zealously within the bounds of the law" and constituted a direct attempt to interfere with a State's witness who was under subpoena to testify in a named case. *State v. Rogers*, 68 N.C. App. 358, 315 S.E.2d 492, cert. denied, 311 N.C. 767, 319 S.E.2d 284 (1984), appeal dismissed, 469 U.S. 1101, 105 S. Ct. 769, 83 L. Ed. 2d 766 (1985).

Informing a potential witness to plead the U.S. Const., Amend. V or to stay away from court unless subpoenaed is not unethical. Certainly no rule prevents an attorney from informing a potential witness of his legal rights. *North Carolina State Bar v. Graves*, 50 N.C. App. 450, 274 S.E.2d 396 (1981).

## Disciplinary Hearing Notes

The attorney advised a potential State's witness that his client would not testify against him if he did not testify against his client and also counseled the witness that he could plead the U.S. Const., Amend. V. Public censure. 79 DHC 10.

## Ethics Opinion Notes

CPR 2. An attorney generally does not need the consent of the adverse party to talk to witnesses.

CPR 340. An attorney may represent a client with a malpractice claim even though the client has entered a contingent fee contract with a medical consultant for case evaluation, preparation and expert witness location, so long as the consultant does not present evidence and the

compensation of the expert witness provided by the consultant is not contingent upon the outcome of the litigation.

### Rule 7.10 Contact with Officials

(a) A lawyer shall not give or lend anything of substantial value to a judge, official, or employee of a tribunal.

(b) In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending except

(1) in the course of official proceedings in the cause;

(2) in writing, if the lawyer promptly delivers a copy of the writing to opposing counsel or to the adverse party if he or she is not represented by a lawyer;

(3) orally, upon adequate notice to opposing counsel or to the adverse party if he or she is not represented by a lawyer;

(4) as otherwise authorized by law.

#### Comment

The impartiality of a public servant in our legal system may be impaired by the receipt of gifts or loans. A lawyer, therefore, is never justified in making a gift or a loan to a judge, a hearing officer, or an official or employee of a tribunal.

All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which he or she presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party. For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered

to opposing counsel or to the adverse party if he or she is not represented by a lawyer. Ordinarily an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel, or, if there is none, to the opposing party. A lawyer should not condone or lend himself or herself to private importunities by another with a judge or hearing officer on behalf of the lawyer or his or her client.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**Cross-References.** - See DR7-110 and Model Rule 3.5.

**Editor's Note.** - Rule 7.10 is identical to former DR7-110.

#### Ethics Opinion Notes

**CPR 16.** A lawyer or group of lawyers may contribute to a judge's campaign in a reasonable amount.

**CPR 183.** An attorney who represents a judge may not appear before the judge.

**CPR 225.** It is permissible for an attorney to appear before his brother judge if the lawyer for the adverse party and his client consent.

**CPR 226.** Although an attorney may not appear before his brother judge without the consent of the parties, his partners and associates may.

**CPR 283.** The fact that a law firm's secretary is the spouse of a magistrate does not disqualify members of the law firm from practicing criminal law before the magistrate.

**CPR 318.** The fact that an attorney's spouse is a judge's secretary does not disqualify the attorney from practicing before the judge.

**RPC 122.** A member of the attorney general's staff may not consult it *ex parte* with a trial court judge if it is likely that that attorney or another attorney working in the same division of the attorney general's office will represent the state in the appeal of the case.

## CANON VIII

### A Lawyer Should Assist in Improving the Legal System

#### Rule 8.1 Action as a Public Official

A lawyer who holds public office shall not

(a) use his or her public position to obtain, or attempt to obtain, a special advantage in legislative matters for himself or herself, or for a client under circumstances where the lawyer knows or it is obvious that such action is not in the public interest;

(b) use his or her public position to influence, or attempt to influence, a tribunal to act in favor of himself or herself or his or her client;

(c) Accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official.

#### Comment

Lawyers often serve as legislators or as holders of other public offices. This is highly desirable, as lawyers are uniquely qualified to make significant contributions to the improvement of the legal system. A lawyer who is a public officer, whether full or part time, should not engage in activities in which the lawyer's personal or professional interests are or foreseeably may be in conflict with his or her official duties.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**Cross-References.** - See DR8-101.

**Editor's Note.** - Rule 8.1 and former DR8-101(A) are identical. The Model Rules contain no counterpart to this rule.

#### Ethics Opinion Notes

**CPR 10.** A town attorney may not represent criminal defendants if he advises the police department and a police officer is the prosecuting witness.

**CPR 112.** A county attorney who is not required to advise the sheriff's department and who does not in fact do so may represent criminal defendants when a member of the sheriff's department is a prosecuting witness.

**CPR 177.** An attorney on the county board of health may not represent a client before such board, but he may resign and represent the client if he acquired no relevant confidential information while on the board.

**CPR 189.** An attorney member of the city council with control over the police department may not represent a criminal defendant when a police officer is a prosecuting witness.

**CPR 231.** An attorney-legislator may represent a criminal defendant when a State highway patrolman is the prosecuting witness.

**CPR 233.** An attorney member of the city council with control over the police department may not represent a criminal defendant when a police officer is a prosecuting witness even if he withdraws from consideration of the budget.

**CPR 263.** An emergency judge may not practice law.

**CPR 282.** A prosecutor for any governmental or jurisdictional entity is barred from representing defendants in criminal actions in which law enforcement officers of the same governmental or jurisdictional entity are the arresting officers or adverse witnesses.

**CPR 290.** An attorney who serves as a member of a county or municipal governing board, or state or federal legislative body, or any entity

thereunder, or committee thereof, shall not hear or consider any matter coming before that governing body or entity in which that member or his firm has any direct or indirect interest.

Pursuant to such prohibition, it shall be unethical for that member to attempt to influence in any way, publicly or privately, the actions or decisions of the governing body or entity or its staff with respect to any matter on which his partner or associate is appearing.

If an attorney or his employee serves as a member of a county or municipal governing board, or state or federal legislative body, or any entity thereunder, or committee thereof, it shall be unethical for his partner, associate or employer to represent such governing body or entity. But see: RPC 193.

It is not unethical as such for an attorney whose spouse or relative is on any county or municipal governing board, or state or federal legislative body, or any entity thereunder, or committee thereof, to appear before or represent that governing body or entity. However, it is unethical for an attorney to use his relationship to a member of any governing board to gain (or retain) employment or obtain favorable decisions.

**CPR 327.** An attorney who serves on per diem basis as a hearing examiner for a public agency may not participate in hearings on behalf of clients before other examiners. His partners and associates may not appear before him, but may appear before other hearing examiners. If the attorney-examiner is appointed to the full board he may not appear before the board under any conditions. His partners should abide by CPR 290.

**CPR 335.** An attorney-magistrate may privately practice law. He may not appear in any criminal case, in any civil case originating in the small claims court in his county, or in any case with which he had any connection as a magistrate.

**CPR 360.** An attorney may counsel a quasi-judicial board and also act as a hearing examiner rendering decisions appealable to the same board during the same time span, but may not act in both capacities in the same case.

**RPC 53.** A lawyer may sue a municipality his partner serves as a member of its governing body.

**RPC 63.** An attorney may represent the school board while serving as a county commissioner with certain restrictions.

**RPC 73.** Opinion clarifies two lines of authority in prior ethics opinions. Where an attorney serves on a governing body, such as a county commission, the attorney is disqualified from representing criminal defendants if a member of the sheriff's department is a prosecuting witness. The attorney's partners are not disqualified.

Where an attorney advises a governing body, such as a county commission, but is not a commissioner herself, and in that capacity represents the sheriff's department relative to criminal matters, the attorney may not represent criminal defendants if a member of the sheriff's department will be a prosecuting witness. In this situation the attorney's partners would also be disqualified from representing the criminal defendants.

**RPC 130.** An attorney may accept employment on behalf of a governing board upon which his or her partner sits if such is otherwise lawful.

## **Rule 8.2 Statements Concerning Judges and Other Adjudicatory Officers**

(a) A lawyer shall not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office.

(b) A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer.

(c) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

### **Comment**

Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney, and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**Cross-References.** - See DR8-102 and Model Rule 8.2.

**Editor's Notes.** - Rule 8.2 is essentially the same as Model Rule 8.2 and former DR8-102. DR8-102 did not include a provision requiring a lawyer who is a candidate for a judicial office to comply with the Code of Judicial Conduct.

## **CANON IX**

### **A Lawyer Should Avoid Even the Appearance of Professional Impropriety**

#### **Rule 9.1 Successive Government and Private Employment**

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee unless the appropriate government agency consents after full disclosure. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter without the consent of the public agency involved.

(b) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or em-

ployee may not represent a private client whose interests are adverse to that person on a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake or continue representation in the matter only with the consent of the person about whom the information was obtained.

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.

(d) As used in this rule, the term "matter" includes

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

(e) As used in this rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

## Comment

This rule prevents a lawyer from exploiting public office for the advantage of a private client.

A lawyer representing a government agency, whether employed or specially retained by the government, is subject to the Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 5.1 of this chapter.

Where the successive clients are a public agency and a private client, the risk exists that power or discretion vested in public authority might be used for the special benefit of a private client. A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of public authority. Also, unfair advantage could accrue to the private client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service.

When the client is an agency of one government, that agency should be treated as a private client for purposes of this rule if the lawyer thereafter represents an agency of another government, as when a lawyer represents a city and subsequently is employed by a federal agency.

Paragraph (b) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

Paragraphs (a) and (c) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 5.1 of this chapter and is not otherwise prohibited by law.

Paragraph (c) does not disqualify other lawyers in the agency with which the lawyer in question has become associated.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**Cross-References.** - See DR9-101 and Model Rule 1.11.

**Editor's Note.** - Rule 9.1 closely follows Model Rule 1.11. The provisions differ in that the Model Rule permits members of a disqualified lawyer's firm to participate if the disqualified lawyer is "screened" from any involvement in the case and does not receive any fee generated therefrom, without regard to whether the adverse party consents. Under Rule 9.1, no member of a disqualified lawyer's firm may participate unless the adverse party consents.

Former DR9-101(B) briefly touched on successive government and private employment. It contained no provision concerning vicarious disqualification. In that regard, reference has traditionally been made to DR5-105(D).

## Case Notes

**No Per Se Disqualification.** - Members of the district attorney's staff are not automatically disqualified from prosecuting persons who were clients of the district attorney when he was in private practice. *State v.*

*Reid*, 104 N.C. App. 334, 410 S.E.2d 67 (1991), cert. granted, 331 N.C. 121, 414 S.E.2d 765 (1992).

Stated in *State v. Reid*, 334 N.C. 551, 434 S.E.2d 193 (1993).

## Ethics Opinion Notes

**CPR 30.** A former legal aid attorney may continue to represent a domestic client in private practice.

**CPR 208.** A former U.S. attorney may represent criminal defendants and civil plaintiffs against the United States so long as he did not participate in substantially related matters while with the government.

**CPR 245.** A former assistant district attorney may not act as private prosecutor in a case he was handling before he left the district attorney's office.

**CPR 306.** A former district attorney who prepared bills of indictment and requests for extradition in a criminal case may not privately prosecute that case.

**CPR 341.** Members of a former assistant district attorney's current law firm may not represent a criminal defendant with respect to whom the former assistant district attorney sought indictment, unless the district attorney consents.

## Rule 9.2 Former Judge or Arbitrator

(a) Except as stated in paragraph (d) below, a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator, or law clerk to such a person unless all parties to the proceeding consent after full disclosure.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as an attorney for a party in a matter in which the lawyer is participating personally and substantially as a judge, other adjudicative officer, or arbitrator. A lawyer serving as a law clerk to a judge, other adjudicative officer, or arbitrator may negotiate for employment with a party or attorney involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, other adjudicative officer, or arbitrator.

(c) If a lawyer is disqualified by paragraph (a) above, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless

(1) the disqualified lawyer is screened from participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate tribunal to enable it to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

## Comment

This rule generally parallels Rule 9.1 of this chapter. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**Cross-References.** - See DR9-101(A) and Model Rule 1.12.

**Editor's Note.** - Rule 9.2 and Model Rule 1.12 are identical.

DR9-101(A) was the correlative provision in the Code of Professional Responsibility. It contained no provision regarding vicarious disqualification. Reference has traditionally been made to former DR5-105(D) in that regard.

## Ethics Opinion Notes

**CPR 113.** An attorney may not represent either party in a domestic case after having signed a consent judgment in the matter as a judge.

**RPC 138.** A partner of a lawyer who represents a party to an arbitration should not act as an arbitrator.

## CANON X

### A Lawyer Should Strictly Preserve the Identity of Funds and Property Held in Trust

#### Rule 10.1 Preserving Identity of Funds and Property of a Client

(a) Any property received by a lawyer in a fiduciary capacity shall at all times be held and maintained separately from the lawyer's property, designated as such, and disbursed only in accordance with these rules. These rules shall not be generally applicable to a lawyer serving as a trustee, personal representative or attorney in fact. However, a lawyer serving in such a fiduciary role must segregate property held in trust from property belonging to the lawyer, maintain the minimum financial records required by Rules 10.2(b) and (c) of this chapter, and instruct any financial institution in which property of a trust is held in accordance with Rule 10.2(f) of this chapter. The financial records referred to above shall be subject to audit for cause and random audit in accordance with the Rules of the North Carolina State Bar.

(b) As a prerequisite to the receipt of any money or funds belonging to another person or entity, either from a client or from third parties, a lawyer shall maintain one or more bank accounts, separately identifiable from any business or personal account of the lawyer, which account or accounts shall be clearly labeled and designated as a trust account. The account or accounts shall be maintained at a bank in North Carolina, unless otherwise directed in writing by the client. For purposes of these rules, the following definitions will apply:

(1) a "bank" is defined as a federally or North Carolina chartered bank, savings and loan association, or credit union;

(2) a "trust account" is an account maintained under the Rules of Professional Conduct in which the lawyer holds any funds in a fiduciary relationship, including those held on behalf of or belonging to a client;

(3) the term "lawyer" shall include all members of the North Carolina State Bar and any law firm in which they are members unless the context clearly indicates otherwise;

(4) the term "client" shall include all persons, firms, or entities for which the lawyer performs any services, including acting as an escrow agent;

(5) the term "instrument" shall include any instrument under the Uniform Commercial Code and any record of the electronic transfer of funds.

(c) All money or funds received by a lawyer either from a client or from a third party to be delivered all or in part to a client, except that received for payment of fees presently owed to the lawyer by the client or as reimbursement for expenses properly advanced by the lawyer on behalf of the client, shall be deposited in a lawyer trust account. No funds belonging to the lawyer shall be deposited into the trust account or accounts except

(1) funds sufficient to open or maintain an account, pay any bank service charges, or pay any intangibles tax; or

(2) funds belonging in part to a client and in part presently or potentially to the lawyer. Such funds shall be deposited into the trust account, but the portion belonging to the lawyer shall be withdrawn when the lawyer becomes entitled to the funds unless the right of the

lawyer to receive the portion of the funds is disputed by the client, in which event the disputed portion shall remain in the trust account until the dispute is resolved.

(d) Except as authorized by Rule 10.3 of this chapter, interest earned on funds deposited in a trust account (less any deduction for bank service charges, fees of the bank, and intangible taxes collected by the bank with respect to the funds) shall belong to the client or clients whose funds have been deposited. The lawyer shall have no right or claim to such interest. A lawyer shall not use or pledge the funds held in a trust account to obtain credit or other personal financial benefit.

(e) Any property or securities belonging to a client received by a lawyer shall be promptly identified and labeled as the property of the client and placed in a safe deposit box or other place of safekeeping as soon as practicable. The lawyer shall notify the client of the location of the property kept for safekeeping by the lawyer. Any safe deposit box used to safekeep client property shall be located in this state unless the client consents in writing to another location. The lawyer shall not keep any property of the lawyer or the lawyer's law firm which is not clearly identified in such safe deposit box or other place of safekeeping.

(f) Any property or titles to property, personal or real, delivered to the attorney as security for the payment of any fee or other obligation owed to the lawyer by the client shall be held in trust under these rules and shall clearly indicate that the property is held in trust as security for the obligation and shall not appear as a direct conveyance to the lawyer. This provision does not apply where the transfer of the property is for payment of fees presently owed to the lawyer by the client; such transfers are subject to the rules governing fees and other business transactions between the lawyer and client.

#### Comment

The purpose of an attorney's trust account is to segregate the funds belonging to clients from those belonging to the attorney. The attorney is in a fiduciary relationship with the client and should never use money belonging to the client for personal purposes. Failure to place client funds in a trust account can subject the funds to claims of the attorney's creditors or place the funds in the attorney's estate in the event of death or disability. The general rule is that every receipt of money from a client or for a client which will be used or delivered on the client's behalf is held in trust and should be placed in the trust account. It would not be applicable in cases where a lawyer handles money for a business, religious, civic, or charitable organization as an officer, employee or other official of that organization. Every attorney who receives funds belonging to clients must maintain a trust account.

The definitions in Rule 10.1(b) are basic and allow the rule to encompass accounts maintained at institutions other than commercial banks. Additionally, the definition of check is intended to encompass any device by which funds may be withdrawn, including nonnegotiable instruments, transfers, and direct computer transfers.

Rule 10.1 is patterned after former Disciplinary Rule 9-102. However, the language used clarifies the deposit requirements. Under the prior

rule, there was some confusion as to whether payments of clients to attorneys for payment of expenses should be deposited in the trust account. The new language eliminates the ambiguity. Under the new rule, all money received by the attorney except that to which the attorney is presently entitled must be deposited in the trust account, including funds for payment of expenses. Funds delivered to the attorney by the client for payment of potential expenses are intended to be used for only that purpose and the funds should never be used by the attorney for personal purposes or subjected to the potential claims of the attorney's creditors.

There is a question as to whether a payment of a retainer by the client should be placed in the trust account. The determination depends upon the fee arrangement with the client. A retainer in its truest sense is a payment by the client for the reservation of the exclusive services of the attorney which by agreement of the parties is nonrefundable upon discharge of the attorney. It is a payment to which the attorney is immediately entitled and should not be placed in the trust account. A "retainer" which is actually a deposit by the client of an advance payment of a fee to be billed on an hourly basis is not a payment to which the attorney is immediately entitled. This is really a security deposit and should be placed in the trust account. As the attorney earns the fee or bills against the retainer, the funds should be withdrawn from the account.

The attorney may come into possession of property belonging to the client other than money. Similar considerations apply concerning the segregation of such property from that of the attorney.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

Cross-References. - See DR9-102 and Model Rule 1.15.

Editor's Note. - Rule 10.1, former DR9-102, and Model Rule 1.15 are similar in content. Rule 10.1 is, however, much more detailed.

### Case Notes

Motive for Commingling Funds Not Pertinent to Issue of Violation. - A lawyer's motive for commingling personal funds with client funds in his trust account is not pertinent to whether defendant violated Code of Professional Responsibility. The Code states that an attorney may keep personal funds in a client trust account for only two limited purposes. If an attorney leaves personal funds in a client trust account for any other purpose, then he has violated the Code. *North Carolina State Bar v. Speckman*, 87 N.C. App. 116, 360 S.E.2d 129 (1987).

### Disciplinary Hearing Notes

Among other things, the attorney, while involved in a series of real estate transactions which required him to deposit funds in a trust account, allowed the trust account balance to fall below the amount necessary to fund all client obligations. The attorney also used the funds of some clients to satisfy the obligations of other clients, commingled client funds by depositing his personal funds into the trust account, and used clients' trust funds to satisfy his personal obligations. Disbarred. 84 DHC 5.

The attorney endorsed a client's medical payment draft without the client's authority, knowledge or consent and deposited the funds in his personal account. The attorney secretly converted a client's funds, failed to notify his client of his receipt of the funds, failed to account for the funds and failed to promptly pay the client the funds in his possession which belonged to the client. Disbarred. 84 DHC 4.

The attorney neglected several client matters, commingled business and personal funds of his clients in a trust account, and failed to maintain complete records of funds of clients in his possession. Three-year suspension, stayed three years upon certain conditions. 91 DHC 5.

Attorney wrote checks to himself totalling \$13,000 from an estate for commissions without the approval of the clerk and without performing the normal duties of a personal representative. Disbarred. 93 DHC 2.

Attorney took \$1500 from the proceeds of the sale of decedent's house as fee and costs for handling the estate. Attorney failed to deposit \$1500 in trust account, failed to administer the estate, and failed to communi-

cate with decedent's daughter who had retained him. Five-year suspension, stayed for one year upon certain conditions. 93 DHC 7.

Attorney failed to monitor clients' funds on deposit in his trust account which resulted in the misappropriation of client funds. Attorney's secretary signed attorney's name or her name to trust account checks and the attorney and his secretary received the benefit of clients' funds. Attorney did not adequately supervise the secretary with respect to the handling of client funds and with respect to the handling of the attorney's trust and business account records. Disbarred. 94 DHC 4.

### Ethics Opinion Notes

CPR 358. An attorney may not use the "float" in his trust account to cover checks written against funds represented by a deposited but uncollected negotiable instrument. Disbursements may be made in advance of actual collection if the bank provisionally credits the trust account upon deposit of the instrument.

CPR 375. An attorney's fee may be interest earned on escrowed funds if the client agrees.

RPC 4. A public defender who retains funds for an incarcerated defendant as a favor must deposit the funds in a trust account.

RPC 47. An attorney who receives from his or her client a small sum of money which is to be used to pay the cost of recording a deed must deposit that money in a trust account.

RPC 51. Where a lawyer receives a lump sum payment in advance which is inclusive of the costs of litigation, the portion representing the costs must be deposited in the trust account.

RPC 96. Attorneys practicing in North Carolina who are affiliated with an interstate law firm may not permit trust funds belonging to their clients to be deposited in a trust account maintained outside North Carolina without written consent.

RPC 150. An attorney cannot permit a bank to link her trust and business accounts for the purpose of determining interest earned or charges assessed if such an arrangement causes the attorney to use client funds from the trust account to offset service charges assessed on the business account.

RPC 158. A sum of money paid to a lawyer in advance to secure payment of a fee which is yet to be earned and to which the lawyer is not entitled must be deposited in the lawyer's trust account.

### Rule 10.2 Record Keeping and Accounting for Client Funds or Property

(a) A lawyer shall promptly notify his or her client of the receipt of any funds, securities, or property belonging in whole or in part to the client.

(b) A lawyer shall maintain complete records of all funds, securities, or other property of a client received by the lawyer. A lawyer shall retain the records required under this rule for a period of six years following completion of the transactions generating the records.

(c) The minimum records of funds received and disbursed by the lawyer shall consist of the following:

(1) a journal, file of receipts, file of deposit slips, or checkbook stubs listing the source, client, and date of the receipt of all trust funds. All receipts of trust money shall be deposited intact with the lawyer retaining a duplicate deposit slip or other record sufficiently detailed to show the identity of the item. Where the funds received are a mix of trust funds and nontrust funds, then the deposit shall be made to the trust account intact and a nontrust portion shall be withdrawn when the bank has credited the account upon final settlement or payment of the instrument;

(2) a journal, which may consist of cancelled checks, showing the date, recipient of all trust fund disbursements, and the client balance against which the instrument is drawn. An instrument drawn from the account for payment of fees or expenses to the lawyer shall be made payable to the lawyer and indicate from which client balance the pay-

ment is drawn. No instruments drawn on the trust account shall be payable to cash or bearer;

(3) a file or ledger containing a record for each person or entity from whom or for whom trust money has been received which shall accurately maintain the current balance of funds held in the trust account for that person;

(4) all cancelled checks drawn on the trust account, whether or not the checks constitute the journal required in (2) above;

(5) any bank statements or documents received from the bank regarding the account, including, but not limited to, notices of the return of any instrument drawn on the account for insufficient funds.

(d) A lawyer shall reconcile the trust account balances of funds belonging to all clients at least quarterly. A lawyer shall render to the client appropriate accountings of the receipt and disbursement of any funds, securities, or property belonging to the client in the possession of the lawyer. Accountings of funds shall be in writing. An accounting shall be provided to the client upon the completion of the disbursement of the funds, securities, or property held by the lawyer, at such other times as may be reasonably requested by the client, and at least annually if funds are retained for a period of more than one year.

(e) A lawyer shall promptly pay or deliver to the client or to third persons as directed by the client the funds, securities, or properties belonging to the client to which the client is entitled in the possession of the lawyer.

(f) Every lawyer maintaining a trust account shall file with the bank where the account is maintained a directive to the drawee bank as follows: Such bank shall report to the executive director of the North Carolina State Bar, solely for its information, when any check drawn on the trust account is presented for payment against insufficient funds. No trust account shall be maintained in any bank which does not agree to make such reports pursuant to the directive.

(g) A lawyer shall produce any of the records required to be kept by this rule upon lawful demand made in accordance with the Rules and Regulations of the North Carolina State Bar.

(h) If a lawyer discovers that he or she holds any funds, securities, or property in a trust account or in any other fiduciary capacity and does not know either the identity or the location or both of the owner thereof, the lawyer shall take the following steps:

(1) the lawyer shall first make due inquiry of his or her personnel, records, files, and other sources of information to determine the identity and location of the owner thereof;

(2) if the identity and location of the owner are determined, the funds, securities, or other property shall be transferred to the owner forthwith;

(3) (A) If the identity, but not the location, of the owner has been determined and the lawyer has not made disbursement of the whole or part of the funds, securities, or properties to the owner in accordance with the previous provisions of this rule and

(i) the principal of the undisbursed portion of the trust account has not increased or decreased within five years;

(ii) the owner has not accepted payment of principal or income for five years;

(iii) the owner has not corresponded in writing with the lawyer within five years; or

(iv) the owner has not otherwise indicated an interest in the account as evidenced by a memorandum or other record on file with the lawyer within five years, then the funds, securities, or properties shall be deemed abandoned property under the provisions of G.S. 116B-18 and the lawyer shall comply with the requirements of Chapter 116B.

(B) If the identity of the owner cannot be determined for whole or part of the funds, securities or properties in the trust account, the lawyer shall designate such portion of the trust account as

abandoned property and shall forthwith transfer the same to the custody of the state treasurer.

(C) Any income or increment due on property deemed abandoned shall not be discontinued or diverted during the period prior to the abandonment unless funds are involved which are subject to the Interest on Lawyers' Trust Accounts (IOLTA) program of the North Carolina State Bar.

(D) Should the lawyer need technical assistance concerning this matter, he or she shall contact the escheat officer, North Carolina State Treasurer, Raleigh. Until they are delivered to the state treasurer, the lawyer shall continue to maintain the funds, securities, or property in accordance with the Rules and Regulations of the North Carolina State Bar.

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## Comment

The lawyer must notify the client of the receipt of the client's property. It is the lawyer's responsibility to assure that complete and accurate records of the receipt and disbursement of client property are maintained. Therefore, there are minimum record-keeping requirements.

The lawyer is also responsible for keeping his or her client advised of the status of any property held by the lawyer. Therefore, it is essential that the attorney reconcile the trust account regularly. The attorney also has an affirmative duty to produce an accounting for the client in writing and to deliver it to the client, either at the conclusion of the transaction or periodically if funds are held for an appreciable period. Such accountings must be made at least annually, and can be made at more frequent intervals in the discretion of the attorney.

The lawyer is also responsible for making payments from his or her trust account only as directed by the client or only on the client's behalf.

A properly maintained trust account should not have any checks returned by the bank for insufficient funds. Although even the best maintained accounts are subject to bank errors, such legitimate problems are easily explained. Therefore, the reporting requirement should not be burdensome.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

**Cross-References.** - DR9-102 and Model Rule 1.15.

**Editor's Note.** - Rule 10.2 incorporates and expands upon former DR9-102(B) and Model Rule 1.15. Rule 10.2(C) contains specific and detailed minimum record-keeping requirements which are not found in either the Code of Professional Responsibility or the Model Rules.

## Case Notes

**Failure to Maintain Records.** - The attorney violated the minimum record-keeping requirements of Rule 10.2 when he failed to maintain any ledgers or other records showing a running balance of each individual client's funds. The attorney's possession of check stubs, cancelled checks, and bank statements failed to meet the minimum requirements. *North Carolina State Bar v. Sheffield*, 73 N.C. App. 349, 326 S.E.2d 320, cert. denied, 474 U.S. 981, 106 S. Ct. 385, 88 L. Ed. 2d 338 (1985).

## Disciplinary Hearing Notes

Attorney failed to pay to his clients or the IOLTA program of the State Bar the interest earned on client funds on deposit in his trust account for a period of ten years. Reprimand. 93 DHC 14.

Attorney borrowed trust account funds from clients but failed to record the loans on the clients' trust account ledger cards and also made entries on clients' ledger cards indicating that monies had been received and fees paid when no monies had been received at the time of the entries. One-year suspension, stayed for three years upon certain conditions. 93 DHC 20.

Attorney failed to monitor clients' funds on deposit in his trust account which resulted in the misappropriation of client funds. Attorney's secretary signed attorney's name or her name to trust account checks and the

attorney and his secretary received the benefit of clients' funds. Attorney did not adequately supervise the secretary with respect to the handling of client funds and with respect to the handling of the attorney's trust and business account records. Disbarred. 94 DHC 4.

### **Ethics Opinion Notes**

**RPC 37.** A law firm which has received money representing the refund of an appeal bond to a client owing substantial fees to the firm may not apply the appeal bond refund to the fees unless an agreement with the client would authorize the firm to do so.

**RPC 44.** A closing attorney must follow the lender's closing instruction that closing documents be recorded prior to disbursement.

**RPC 48.** Opinion outlines professional responsibilities of lawyers involved in a law firm dissolution.

**RPC 66.** An attorney serving as an escrow agent may not disburse in a manner not contemplated by the escrow agreement unless all parties agree.

**RPC 69.** A lawyer must obey the client's instruction not to pay medical providers from the proceeds of settlement in the absence of a valid physician's lien.

**RPC 75.** A lawyer may not pay his or her fee or the fee of a physician from funds held in trust for a client without the client's authority.

**RPC 78.** A closing attorney cannot make conditional delivery of trust account checks to real estate agent before depositing loan proceeds against which checks are to be drawn.

**RPC 86.** Opinion discusses disbursement against uncollected funds, accounting for earnest money paid outside closing, and representation of the seller.

**RPC 89.** Trust funds must be held at least five years after the last occurrence of certain prescribed events before they may be deemed abandoned.

**RPC 125.** An attorney may not pay a medical care provider from the proceeds of a settlement negotiated prior to the filing of suit over his client's objection unless the funds are subject to a valid lien.

**RPC 149.** An attorney may not donate a client's funds to a charity without the client's consent.

### **Rule 10.3 Interest on Lawyers' Trust Accounts**

(a) Pursuant to a plan promulgated by the North Carolina State Bar and approved by the North Carolina Supreme Court, a lawyer may elect to create or maintain an interest bearing trust account for those funds of clients which, in the lawyer's good faith judgment, are nominal in amount or are expected to be held for a short period of time. Funds deposited in a permitted interest bearing trust account under the plan must be available for withdrawal upon request and without delay. The account shall be maintained in a depository institution authorized by state or federal law to do business in North Carolina and insured by the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the North Carolina Guaranty Corporation. The North Carolina State Bar shall furnish to each lawyer or firm which elects to participate in the Interest on Lawyers' Trust Account Program a suitable plaque or scroll indicating participation in the program, which plaque or scroll shall be exhibited in the office of the participating lawyer or firm. Such scroll or plaque will contain language substantially as follows:

"THIS OFFICE PARTICIPATES IN THE NORTH CAROLINA STATE BAR'S INTEREST ON LAWYERS' TRUST ACCOUNT PROGRAM. Under this program funds received on behalf of a client which are nominal in amount or are expected to be held for a short period of time will be deposited with other similar funds in a joint interest-bearing trust account. The interest generated on all funds so deposited will be remitted to the North Carolina State Bar to fund programs for the public's benefit."

(b) Lawyers or law firms electing to deposit client funds in a trust account under the plan shall direct the depository institution

(1) to remit interest or dividends, as the case may be (less any deduction for bank service charges, fees of the depository institution, and intangible taxes collected with respect to the deposited funds) at least quarterly to the North Carolina State Bar;

(2) to transmit with each remittance to the North Carolina State Bar a statement showing the name of the lawyer or law firm maintaining the account with respect to which the remittance is sent and the rate of interest applied in computing the remittance;

(3) to transmit to the depository lawyer or law firm at the same time a report showing the amount remitted to the North Carolina State Bar and the rate of interest applied in computing the remittance.

(c) The North Carolina State Bar shall periodically deliver to each non-participating lawyer a form whereby the lawyer may elect, by the ensuing January 31, not to participate in the IOLTA plan. If a lawyer does not so elect within the time provided, the lawyer shall be deemed to have opted to participate in the plan as of that date and shall provide to the North Carolina State Bar such information as is required to participate in IOLTA.

(d) A lawyer or law firm participating in the IOLTA plan may terminate participation at any time by notifying the North Carolina State Bar or the IOLTA Board of Trustees. Participation will be terminated as soon as practicable after receipt of written notification from a participating lawyer or firm.

(e) Upon being directed to do so by the client, a lawyer may be compelled to invest on behalf of a client in accordance with Rule 10.1 of this chapter those funds not nominal in amount or not expected to be held for a short period of time. Certificates of deposit may be obtained by a lawyer or law firm on some or all of the deposited funds of clients, so long as there is no impairment of the right to withdraw or transfer principal immediately.

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**Editor's Note.** - The Code of Professional Responsibility and the Model Rules contain no counterparts to Rule 10.3.

### **Disciplinary Hearing Notes**

Attorney failed to pay to his clients or the IOLTA program of the State Bar the interest earned on client funds on deposit in his trust account for a period of ten years. Reprimand. 93 DHC 14.

### **Ethics Opinion Notes**

**RPC 150.** An attorney cannot permit a bank to link her trust and business accounts for the purpose of determining interest earned or charges assessed if such an arrangement causes the attorney to use client funds from the trust account to offset service charges assessed on the business account.

# Adopted RPC Ethics Opinions

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# Adopted Rules of Professional Conduct

## Ethics Opinions

### Editor's Note

After the Rules of Professional Conduct were adopted in October 1985, ethics opinions published for comment in the *Newsletter* were identified as "proposed RPCs" and numbered in sequence beginning with the number 1. The first opinion was identified in the *Newsletter* as "Proposed RPC 1," the second as "Proposed RPC 2," and so on. In most instances, these proposed opinions were finally approved by the Council of the North Carolina State Bar at quarterly business meetings immediately following their publication. Although the council's actions were reported in the *Newsletter*, none of the ethics opinions were officially republished in their final form. As a result, more than 200 final ethics opinions exist exclusively in old *Newsletters* where they are identified only as "proposed" opinions. Not surprisingly, this has engendered a great deal of confusion among legal researchers.

The *Lawyer's Handbook* is intended to eliminate this confusion. Every ethics opinion adopted by the council since the promulgation of the Rules of Professional Conduct is presented here in its final and definitive form. Each opinion bears the identifying number assigned to it at the time of its initial publication. For instance, the opinion originally published as "proposed RPC 1" is now officially designated as "RPC 1." Following the RPC designation of each opinion is the date upon which the council adopted the opinion, a topical headnote, a short summary of the opinion, and the full text of the opinion itself. Please note that the headnote and the summary are unofficial and provided only as research aids.

In some instances proposed opinions were revised and republished for comment one or more times before their ultimate adoption by the council. Whenever such an opinion was adopted by the council, it was customary to refer to the opinion as a revised opinion, for example, "RPC 132 (second revision)." Since, however, the council never adopts more than one version of the same opinion, it is, in the editor's judgment, unnecessary to refer to any final opinion as "revised." Accordingly, none of the opinions published in this volume is designated as a "revision." Please note, however, that to assist persons who are interested in the history of an opinion or who are consulting reference materials predating this handbook, editor's notes are included which identify the opinions previously designated as revised opinions.

### RPC 1

January 17, 1986

#### Bail-Bondsman Investigator

*Opinion rules that a lawyer may not employ a bail-bondsman as regular part-time investigator.*

#### Inquiry:

Attorney A is a licensed attorney in private practice in North Carolina. Attorney A would like to hire B as a part-time private investigator. B currently works both as a licensed private investigator and a licensed bail-bondsman. Attorney A wishes to enter into a contractual arrangement by which he would pay B a set monthly fee for private investigation services.

Attorney A has never received a client as a result of B's bail-bond business. He has asked B to write bonds for 4 or 5 clients, and B has done so on all but one of those occasions. Attorney A has no other connection with B's bail-bond business and does not anticipate any change in that situation.

B wishes to retain his bail-bond license and to continue to work part-time as a bail-bondsman. If Attorney A retains B on a regular basis as a part-time investigator, B's bail-bond business would remain entirely separate and independent of Attorney A's legal practice except that Attorney A would probably, on occasion, request that B write a bail-bond for one of Attorney A's clients. Attorney A would have nothing else to do with B's bail-bond business and would observe strictly the prohibition of an attorney's owning or operating a bail-bond business.

May Attorney A ethically enter into a contractual relationship with B for regular part-time private investigation services under the conditions set out above? If so, may Attorney A list him on his letterhead as a licensed private investigator on Attorney A's staff?

#### Opinion

No. The proposed contractual relationship gives an appearance of impropriety.

### RPC 2

January 17, 1986

#### Contingent Fees in Child-Support Cases

*Opinion rules that a lawyer may charge a contingent fee to recover child support payments.*

#### Inquiry:

A and B were formerly married and are the parents of C. A has custody of C pursuant to court order. B is required by court order to make specific child support payments, but B is

currently in arrears in his child support payments in a definite sum.

May Lawyer L ethically represent A in a child support enforcement action against B upon a fee contract specifying an agreed percentage of such monies collected?

#### Opinion:

Lawyer L's proposal for a fee arrangement with A contemplates a contingent fee payable upon collection of specific amounts of past due child support payments. Rule 2.6(a) prohibits an illegal fee arrangement or collection of an illegal or clearly excessive fee. Numerous factors are to be considered in determining whether a fee is excessive. Contingent fees are only explicitly prohibited in criminal cases.

Rule 2.6(c). Contingent fees also appear to be prohibited in North Carolina, as a result of a decision of the North Carolina Court of Appeals, if the contract makes the fee contingent upon procuring a divorce or upon the amount of alimony and/or property awarded in a divorce case. *Thompson v. Thompson*, 70 N.C. App. 147, 319 S.E.2d 315 (1984), rev. on the other grounds, 313 N.C. 313, 328, S.E.2d 288 (1985).

Many jurisdictions, like North Carolina, hold contingent fee arrangements in domestic relations actions void as against public policy where the fee is contingent upon procuring a divorce or the amount of alimony or child support payments, or property settlement in lieu thereof, to be awarded. See *Speiser, Attorneys' Fees* §2:6 (1973). However, most jurisdictions which have considered the issue of contingent fees for attorney efforts to collect specific amounts of past due support payments owed pursuant to contract or prior court order have concluded that such arrangements do not violate the public policy prohibiting contingent fee contracts in divorce actions based upon the amount of alimony or child support to be awarded or on a property settlement in lieu thereof. Bar organizations reaching these conclusions include Florida (See *Lawyers' Manual on Professional Conduct* 801:2501), the Birmingham Bar Association (See *Lawyers' Manual on Professional Conduct* (801:1103), and New York County Bar Organization (See *Lawyers' Manual on Professional Conduct* 280).

A lawyer is not necessarily prohibited from entering into a contingent fee arrangement for collection of liquidated amounts of past due support. However, the lawyer must always keep in mind the prohibition against entering into an agreement for, charging, or collecting an excessive fee and the factors listed in Rule 2.6(b). If, for example, collection of the past due child sup-

port appears to be relatively simple and assured because of known assets or garnishment procedures available to lawyer L's client, a contingent fee may be inappropriate as resulting in an excessive fee in view of the time and labor involved, novelty and difficulty or lack thereof of the questions involved, skill necessary to perform the legal service properly, likelihood or lack thereof that acceptance of the employment will preclude other employment by the attorney, fee normally charged for similar circumstances, and other factors. The attorney may need to charge a significantly smaller percentage than in cases, such as personal injury actions, where any recovery at all or the amount likely to be recovered may be highly speculative. Where a client is currently unable to pay an attorney for services in collecting child support or alimony payments, which have been reduced to a sum certain and are currently in arrears, an attorney may wish to enter into an agreement by which the client simply defers payment until a later date with an interest charge where the procedures involved are neither novel nor unduly difficult and where known assets or attachment or garnishment procedures are apparently available for collection on the past due support payments. Alternatively, a contingent fee contract might provide for a substantially smaller percentage of the amount collected than in other types of contingency cases.

Lawyer L is not automatically prohibited from entering into a contingent fee arrangement with A in a child support enforcement action against B in the action for collection of specific past due child support payments, but may wish to consider whether a contingent fee arrangement will result in or may result in an excessive fee, at least if the agreement is for the usual percentage in cases handled on a contingent fee basis where success or the amount to be obtained may be far more speculative.

## RPC 3

April 18, 1986

### Lawyer as Trustee

*Opinion rules that lawyer may act as Trustee after having represented the seller.*

#### Inquiry:

Attorney A is the Trustee under a Purchase Money Deed of Trust securing a Purchase Money Note representing part of the purchase price of a tract of land sold by Seller to Buyer. Attorney A represented Seller in the negotiations concerning the Note and Deed of Trust prior to closing. Attorney B represented Buyer throughout these negotiations and continues to do so. Attorney A was named as Trustee in the Purchase Money Deed of Trust, which was duly recorded.

Subsequently, Seller instructed Attorney A to commence foreclosure proceedings as Trustee, which Attorney A did. Attorney A instructed Seller to retain separate counsel. Seller is now

represented by Attorney C. Buyer was served with notice of the foreclosure proceeding, and a hearing was duly held before the Clerk of Superior Court. As Trustee, Attorney A took no active role at the hearing. Attorney C presented the evidence on behalf of the Seller while Attorney B, representing Buyer, contested the foreclosure, disputing that default existed and arguing for a different interpretation of the documents.

At the foreclosure hearing, Attorney B filed a Motion to have Attorney A disqualified and removed as Trustee, citing Attorney A's prior representation of Seller at closing, his continued representation of Seller thereafter, his participation in negotiation of the documents now in dispute, a general appearance of impropriety, and an alleged duty of the Trustee to determine the existence of default in an impartial manner.

Does Attorney A, as Trustee, in fact have a duty to investigate the facts supporting the alleged existence of default, or make any determination of default in such capacity, other than his ministerial duties involving commencement of the proceeding, service on the appropriate parties, and conducting the public sale as so ordered by the Court? Under these circumstances, must Attorney A resign as Trustee from a contested foreclosure hearing by reason of his prior representation of Seller at closing, his participation in the negotiation of the documents in dispute, his subsequent continual representation of the Seller on other unrelated matters, or a general appearance of impropriety by reason of his prior representation of Seller?

#### Opinion:

Precise definition of the duties of the Trustee require a legal interpretation, not within the realm of the Ethics Committee or the North Carolina State Bar. Prior opinions considering the situation of the attorney who represented one of the parties to a transaction and who is also Trustee have required the attorney either to resign as Trustee if he wishes to represent his client in a contested foreclosure proceeding or related proceedings or to continue serving as Trustee without representing any party once the foreclosure proceeding becomes contested, in the foreclosure proceeding itself or in related proceedings. See CPRs 305, 297, 220, 201, 166, 137, and 94. These CPRs have recognized that the Trustee owes a duty of impartiality to both parties which is inconsistent with representing one of the parties in a contested proceeding. However, no prior opinion has held that the Trustee may not serve as Trustee because of prior representation of one of the parties where he does not continue to represent either party in the contested foreclosure or related proceedings. Generally, when an attorney is required to withdraw from representation or from a fiduciary role, it is either because of concerns of confidences of the client under Rule 4 and its predecessors or because of conflicts of interest

under Rule 5.1 or its predecessors where the attorney would be put in the position of inconsistent roles or obligations at the same time or in the same proceeding. Since neither of those circumstances exist, and the rules do not appear to be directly relevant by their terms or with regard to their purposes, Attorney A is not ethically prohibited from continuing to serve as Trustee in a contested foreclosure matter, despite his prior representation of Seller, where he does not currently represent Seller in the foreclosure or related proceedings. This opinion does not attempt to interpret statutory or case law as to the duties of the Trustee or any legal restrictions upon his eligibility to serve as Trustee.

## RPC 4

April 18, 1986

### Handling of Client Money by Public Defender

*Opinion rules that money belonging to an incarcerated client may be handled by the Public Defender as a favor and must be deposited into a trust account.*

#### Inquiry:

Attorney A works in the office of a Public Defender in one of the Judicial Districts in North Carolina. The Public Defender's office does not maintain bank accounts or trust accounts of any kind. From time to time, clients in jail request that lawyers in the Public Defender's Office "do them a favor" such as getting a check cashed, sending a money order, or cashing a money order. Attorney A is sometimes asked by a client in jail to cash a check payable to and endorsed by the client and return the proceeds to the client. Attorney A is sometimes asked also by a client in jail to take a sum of money provided by the client to purchase a money order payable to a relative of the client. Attorney A may also be asked by a client in jail to have a relative or friend of the client send a money order payable to the attorney and then to pay the proceeds of the money order to the client.

May Attorney A perform any of these services for a client in jail? If so, what accounting procedures are necessary? Would a trust account be required?

#### Opinion:

Nothing in the Rules of Professional Conduct prohibits an attorney from performing a favor for his clients such as cashing a money order, purchasing a money order, or cashing a check for him. Rule 10.1(c) requires an attorney to deposit all money or funds received from a client or from a third party to be delivered to a client into a trust account and then make all disbursements as appropriate, from that trust account.

## RPC 5

April 18, 1986

### The Lawyer as "Doctor"

*Opinion rules that attorney holding a Juris Doctor degree may not on that basis refer to himself as holding a Doctorate or use the term "Doctor" to refer to himself.*

#### Inquiry:

Attorney X is licensed to practice law in the State of North Carolina and holds a Juris Doctor degree from an accredited university. May Attorney X ethically hold himself out as having a Doctorate, using the term "Doctor" in oral communication, referring to himself as Dr. X, and signing his name Dr. X?

#### Opinion:

Under the new North Carolina Rules of Professional Conduct, it is impermissible under Rule 1.2(c) to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation and impermissible under Rule 2.1 to make a false or misleading communication about the lawyer or the lawyer's services. Other jurisdictions which have considered this question have ruled both ways. Since it does not appear to be normal practice to refer to a Juris Doctor degree as simply a Doctorate or to refer to an attorney holding a Juris Doctor degree as "Doctor," the use of those terms without explanation could be misleading and therefore is inappropriate.

## RPC 6

April 18, 1986

### Solicitation of Corporate Clients

*Opinion rules that lawyers may not solicit corporate clients.*

#### Inquiry:

Attorney A would like to be able to contact an officer of a corporation, the managing or general partner of a partnership, or an executive officer of some other form of business entity or institution, the entity or institution being a prospective client, in person, by telephone or by mail, for purposes of informing the prospective client of the types of law practice in which the law firm of which the contacting lawyer is a member, engages. Attorney A would furnish information in verbal and printed form as to the professional personnel of the firm, their educational backgrounds, fields of practice and biographical data. Attorney A would also inform the prospective client of the fees and charges made by the law firm for legal services and express a desire on the part of the law firm to be considered for employment by the prospective client in connection with any legal matters requiring consultation or representation. It is assumed that Attorney A has no family or prior professional relationship with the officer, director or partner of the prospective client who is contacted, and no prior relationship with the client. A significant motive for the contact would be pecuniary gain, specifically obtaining repre-

sentation of the prospective client. It is assumed that there would be no fraud, deceit or misrepresentation in connection with the contact or any communications made pursuant thereto. It is also assumed that Attorney A would not be aware of any specific matter of suit or proceeding by or against the prospective client and therefore would not be making the contact with view to obtaining representation in a particular matter; however, Attorney A would be contacting an entity which he knows or believes routinely employ counsel in the ordinary course of its business to perform a variety of legal services.

May Attorney A as an individual or on behalf of a law firm make the contacts or communications as proposed? If so, would he be able to do so under circumstances in which he is aware of a specific matter or suit or proceeding by or against the prospective client and makes the contact with a view to obtaining representation in that matter? Does it make any difference if he makes the contact with the view to obtaining representation in connection with specific types or kinds of matters of a specialized nature rather than a general representation?

#### Opinion:

No, Attorney A may not make such contacts under any of the circumstances outlined in the Inquiry. Rule 2.4 prohibits an attorney from soliciting employment from a prospective client with whom he has no prior relationship, whether by mail, in person, or otherwise, if a significant motive is the lawyer's pecuniary gain. There is an exception for general mailings or circulars distributed on a broad basis as such distributions are more in the nature of advertising. However, the contacts proposed by Attorney A are all ones to specific entities rather than general distribution of material. Rule 2.4 forbids the conduct proposed by Attorney A under any of the circumstances described.

## RPC 7

July 25, 1986

### Employment of Collection Agency

*Opinion rules that a lawyer may employ a collection agency to collect past due fees under certain circumstances.*

#### Inquiry:

A collection agency has approached several lawyers about collecting the lawyer's uncollectible and/or past due accounts for legal services. May an attorney licensed and practicing in North Carolina ethically turn over past due and/or delinquent accounts for legal services to be collected by a collection agency either on a straight fee basis and/or a percentage of any amount collected?

#### Opinion:

Yes. However, there are limits on the circumstances under which a lawyer personally may undertake to collect a delinquent client account. Additional limits are imposed by the lawyer's

employment of another to undertake that effort on his behalf. Accordingly, a lawyer may employ the services of an agency to collect a delinquent account only so long as -

1. The fee agreement out of which the account arose was permitted by law and by the Canons and Rules of Professional Conduct. Rule 2.6(a), (b), (c), and (d), North Carolina Rules of Professional Conduct (NCRPC).

2. The lawyer, at the time of making the fee agreement out of which the account arose, did not believe, and had no reason to believe, that he was undertaking to represent a client who was unable to afford his services. Canon II; Preamble, Paragraph Five, NCRPC; Rule 7.1, comment, NCRPC

3. The legal services, giving rise to the fee out of which the account arose, have been completed so that the lawyer has no further responsibilities as the client's attorney. See Rule 5.1(b) and Rule 5.1, comment, Paragraph Five, NCRPC.

4. There is no genuine dispute between the lawyer and the client about the existence, amount, or delinquent status of the indebtedness. See Rule 2.6, comment, Paragraph Three, NCRPC

5. The lawyer does not believe, and has no reason to believe, that the agency which he employs will use any illegal means, such as those prohibited by North Carolina General Statutes Sections 66-49.43 through 49.47, in its effort to collect the account. Rule 1.2, NCRPC; Preamble, Paragraph Four, NCRPC

If these criteria are met, a lawyer may employ an agency to collect a delinquent client account, and he or she may agree to compensate the agency by any appropriate means, including compensation on the basis of a percentage of the amount collected.

It is true that the North Carolina Rules of Professional Conduct generally prohibit the sharing of legal fees with a nonlawyer. Rule 3.2, NCRPC This general prohibition arises out of the requirement that a lawyer "assist in preventing the unauthorized practice of law." Canon III, NCRPC The purpose of the Rule is to further one of the principles underlying the Canon by "protect[ing] the lawyer's professional independence of judgment." Comment, Rule 3.2, NCRPC The delinquent status of the account pre-supposes (as is made explicit in criterion (3), above) that the legal services have been completed and no further professional judgment is required of the lawyer on behalf of the client. Once services have been completed, and the fee has over-ripened into a delinquent account, the reason for the prohibition of Rule 3.2 no longer exists.

This opinion represents a change. Prior opinions, rendered under the Code of Professional Responsibility, CPRs 339,71, and 1, prohibited the collection of delinquent client accounts by an agency. Those opinions were based on Ethical Consideration 2-23 which advised that law-

yers "should avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject." Like other Ethical Considerations under the Code, however, E.C. 2-23 was "aspirational" and, unlike the Disciplinary Rules, not "mandatory." Preliminary Statement, Code of Professional Responsibility. The Code, including its Ethical Considerations, has been superseded by the Rules of Professional Conduct (Approved by the Supreme Court of North Carolina on October 7, 1985). The reasoning underlying E.C. 2-23 was sound before its repeal and remains sound today. A lawyer, however, was not required then, and is not required now, to heed its advice. Accordingly, CPR s 339, 71, and 1 are hereby expressly overruled.

This opinion is in accord with the conclusions of a majority of the Bar governing bodies in other states which have considered the issue in recent years. See Georgia Opinion 49 (July 26, 1985); Iowa Opinion 83-21 (July 18, 1983); Arizona Opinion 82-2 (January 30, 1982); Florida Opinion 81-3(M) (1981); Maryland Opinion 82-84 (December 7, 1981); but see West Virginia Opinion 80-1 (January 16, 1981).

## RPC 8

January 16, 1987

[Editor's Note: This opinion was originally published as RPC 8 (Revised).]

### Representation of Uninsured Motorist

*Opinion rules that a lawyer employed by an insurer to represent an uninsured motorist must not withdraw after settlement until he obtains permission of the tribunal and takes steps to minimize prejudice to his client.*

#### Inquiry:

A was injured while sitting in a parked automobile struck by an automobile being driven by B and owned by C, who was a passenger. There was no insurance coverage on the vehicle being operated by B. A had uninsured motorist coverage with X insurance company. A brought an action against B and C, and X company employed attorney W to defend against A's action. Eventually, A and X company settled as between them, with X company taking an uninsured motorist release, X company wished to pursue its subrogation claim against B and C. The action was not dismissed and remains on the calendar.

X company has suggested that it employ A's original counsel to pursue the action on behalf of X company. Attorney W raised the question about his obligation to defend the action for B and C since he appears as attorney of record. X company does not appear as a party to the action in any of the pleadings. X company has suggested that Attorney W file a motion to withdraw as counsel and that he advise B and C that they can employ separate counsel at their own expense or go forth without representation. At no time has anyone advised B or C that such an

action might be forthcoming. B and C were merely advised that X company would pay the expenses of Attorney W in the action brought by X company's insured against them as uninsured motorists.

May Attorney W ethically withdraw as suggested, giving B and C the advice they can employ their own counsel or go forth without representation? If not, what is his obligation?

#### Opinion:

A lawyer undertaking to represent individuals at the request of and at the expense of an insurance company should have had full discussion and understanding with the individual client concerning the fee and arrangements and the conditions upon the lawyer's representation of the client. See comment to Rule 2.6; Rule 5.6. Under no circumstances may Attorney W withdraw without complying with any rules of the tribunal and without taking reasonable steps to avoid foreseeable prejudice to B and C. See Rule 2.8 (a). Under these circumstances, Attorney W will have to discuss the situation with B and C to clarify their understanding of the basis upon which Attorney W agreed to represent them and to determine what prejudice might result from his withdrawal. Depending on the circumstances, including the potential prejudice to the clients and the terms of the agreement between Attorney W and the clients. Attorney W may ethically be required to continue representing B and C in order to insure that they do not suffer undue prejudice and in order to fulfill any obligations created by his representations to B and C concerning his appearing on their behalf.

## RPC 9

July 25, 1986

### Representation of Lenders and Borrowers by Corporate House Counsel

*Opinion states that house counsel for a mortgage bank may not represent other lenders and borrowers while serving as house counsel.*

#### Inquiry:

X Corp. is a mortgage bank whose primary business is the origination of first mortgage loans. X Corp. receives an origination fee and has no proprietary interest in the note and deed of trust. X Corp. desires to employ Attorney A to represent the actual lender/investors who do not have proprietary interests in the transactions, with the knowledge and consent of said lenders/investors. Attorney A would also perform in-house legal services unrelated to such transactions on behalf of X Corp. as house counsel for X Corp.

May Attorney A ethically represent the borrowers in closing loans originated by X Corp. as well as representing the lender/investors who have proprietary interests? May the borrowers be charged a fee? It is understood that Attorney A may not represent any of the parties regarding any dispute arising out of the contemplated

closing transactions and that Attorney A's representation would be limited to legal services performed in closing the loans.

In the alternative, may Attorney A ethically share space with X if A maintains independence and assures client confidentiality? May Attorney A receive a retainer from X in such a situation?

#### Opinion:

If Attorney A is employed as house counsel for X Corp., which merely originates the mortgage loans and does not have any proprietary interests of its own, Attorney A may not ethically be employed as house counsel for X Corp. and, in that capacity, represent either the lenders or the borrowers in closing loans originated by X Corp. Where Attorney A is paid as and acts as house counsel for a corporation which has no proprietary interest in the transaction, his representation of the lenders, investors, or borrowers in that capacity may constitute the unauthorized practice of law by the corporation which employs him. Attorney A would be acting in violation of Rule 3.1 (a) in aiding a person, in this case X Corp., in the unauthorized practice of law. Additionally, for the lenders, the investors, or borrowers to pay a fee to X Corp. for this service performed by Attorney A would constitute the division of legal fees by Attorney A with a nonlawyer, specifically X Corp., in violation of Rule 3.2.

If Attorney A maintains his independence and simply represents lenders, investors, and/or borrowers in response to referrals from X Corp., he may do so ethically provided that full disclosure is made as to any regular relationship between Attorney A and X Corp. Under these circumstances, Attorney A may receive a retainer from X Corp. for legal services performed by Attorney A on behalf of X Corp. Attorney A may do so even though he shares office space with X Corp. if he does in fact maintain his practice independently and if, as previously indicated, all clients referred by X Corp. consent to the representation after full disclosure of any relationship between Attorney A and X Corp.

It is noted that in no event may a lender require a borrower to employ a particular attorney. CPRs 108 and 240.

## RPC 10

October 24, 1986

### Private Lawyer Referral Service

*Opinion rules that a lawyer may affiliate with a private referral service under certain conditions.*

#### Inquiry:

May a group of lawyers enter into an agreement with a corporation operated for profit under which the corporation (a) as agent for the participating attorneys, advertises the availability of legal services through a private lawyer referral service; (b) makes referrals of persons who respond to the advertisement to the partici-

pating lawyers; and (c) is paid a fixed annual fee as compensation for its services as advertising and referral agent of the participating lawyers?

#### **Opinion:**

Yes, if the conditions set forth in Rule 2.2 of the Rules of Professional Conduct are satisfied:

1. The compensation payable to the corporate agent of the participating lawyers for administrative services shall be reasonable in amount.

2. Advertisements placed through the corporate agent must be paid from the fees paid to the corporate agent by participating attorneys. The corporate agent may not expend its own funds to advertise its own lawyer referral service. It may advertise only as the agent of participating attorneys.

3. The corporate agent may not profit from its referral of prospective clients to participating attorneys. Payment of fixed fees in advance of performing the services described in the inquiry do not violate this condition provided such fees and the compensation they represent are reasonable in amount. Such fees payable to the corporate agent do not materially differ from the compensation paid to the employees and agents of the nonprofit lawyer referral service approved in CPR 359.

4. The corporate agent and its employees may not initiate contact with prospective clients.

5. All advertisements shall comply with the requirements of Rule 2.2(c)(5) and Rule 2.1.

Any lawyer participating in the arrangement shall be professionally responsible for its operation. Under no circumstances may a lawyer affiliate with a referral service which offers legal advice or otherwise engages in the unauthorized practice of law.

### **RPC 11**

October 24, 1986

#### **Married Lawyers in Different Firms**

*Opinion rules that when married lawyers are employed in different firms and those firms represent adverse parties, neither firm is disqualified.*

#### **Inquiry:**

Firm One employs Lawyer A as an associate. Lawyer A is married to Lawyer B who is a partner in firm Two. Lawyer A was formerly an associate in Firm Two. Both Firm One and Firm Two have more than one office. However, Lawyer A and Lawyer B practice in offices of their respective firms in the same city, where they reside.

Where Firm One and Firm Two represent adverse or potentially adverse interest in a matter, but neither Lawyer A nor Lawyer B participates actively in the matter, is either firm disqualified from that representation? What inquiry must be made, if any, if the facts do not make the potential involvement of the other spouse's firm immediately apparent? Is client disclosure and consent required for accepting representation?

Is it necessary for the firm to insulate or "build a Chinese Wall around" the spouse attorney where actual or potential adverse representation is apparent?

Where Firm One and Firm Two represent adverse or potentially adverse interests in a matter, may either Lawyer A or Lawyer B participate in the representation? If so, what disclosure or client consent is required? Does it matter whether the fact of adverse representation is revealed only after substantial involvement or attention to the matter by either or both firms?

#### **Opinion:**

Rule 5.9 of the Rules of Professional Conduct prohibit a lawyer who is related to another lawyer as parent, child, sibling, or spouse from representing a client in a representation adverse to a person whom the lawyer knows is represented by the spouse or other relative unless the client consents after full disclosure concerning the relationship. The Rule specifically provides that it does not disqualify other lawyers in the firm. Thus, Firm One and Firm Two may represent adverse or potentially adverse interests. The Rule does not appear to require client disclosure and consent where the spouse partner or associate is not actively involved in the representation. Nor is there necessarily any need for any special inquiry if the spouse partner or associate is not involved in the case. Nor does there appear to be any reason to "build a Chinese Wall around" the spouse attorney simply because a firm in which his spouse is a partner or associate is actively involved in representing adverse or potentially adverse interest. Should the spouse attorney acquire any "confidential information" within the meaning of Rule 4, he or she is required to observe the confidential nature of that information, even in communicating with his or her spouse.

Rule 5.9 implicitly permits one spouse to participate in matters even though his or her spouse is a partner or associate in a firm representing an adverse interest where the other spouse does not appear to be participating actively. However, client disclosure and consent may be required if there is any reason to believe that the spouse lawyer's own interest may be involved. (See Rule 5.1(b)). This will depend on the circumstances in view of the case, the size of the firms, effect upon the income of the two spouses, and other relevant matters. For example, since Lawyer B is a partner in Firm Two and presumably received income based upon a percentage of Firm Two's profits, Lawyer A's personal interest under Rule 5.1 (b) could be involved, as a result of the effect on family income, in a case in which Firm Two, but not necessarily Lawyer B, represents an adverse party. Consideration of the type of fee, the amount of money involved, the financial relationship between firm income and Lawyer B's income, and other matters may be relevant here. Under any circumstances, the representation by

either firm, or even by either of the spouses, may be undertaken if the client consents after full disclosure of the relationship and possible consequences or effects on the representation, if any, in view of the firm and the particular lawyer involved. See Rule 5.9; see Rule 5.1.

Whenever either spouse is involved in representation in a matter in which the other spouse's firm also represents one of the parties, great care should be taken to ensure that no problems are created as a result of the relationship and the representation, such as may happen even by a message left at the attorney's home by the client. See ABA Formal Opinion 340 (September 3, 1975).

### **RPC 12**

October 24, 1986

#### **Revealing Confidential Information to Correct a Mistake**

*Opinion rules that a lawyer may reveal confidential information to correct a mistake if disclosure is impliedly authorized by the client.*

#### **Inquiry:**

In 1984 Lawyer L was asked by a mobile home sales organization to prepare two deeds. One deed was for conveyance of certain real estate from a husband and wife to the mobile home sales organization. The second deed was to convey the same property from the mobile home sales organization to a financial corporation. Since then, a representative of the mobile home sales organization informed Lawyer L that the deeds should, in fact, have been a deed of trust to secure the mobile home sales organization, which would have assigned it and the note secured thereby to the financing corporation. Lawyer L has written the mobile home sales organization advising its representative that the property should be put back in the names of the original grantors and a proper deed of trust from them should be put on the record. To date, the mobile home sales organization has not, as far as Lawyer L is aware, attempted to get the instruments changed from deeds to a deed of trust. Lawyer L has not contacted the original land owners.

What duty does Lawyer L owe the original land owners concerning advising them of the status of their title? Since the mobile home sales organization has not responded to Lawyer L's recommendations to straighten out the title problems, what duty does Lawyer L owe that organization?

#### **Opinion:**

Lawyer L was employed by the mobile home sales organization, and the information he received from the mobile home sales organization was given to him in his capacity as the organization's attorney. The statements by the mobile home sales organization representative indicating that the deeds were not the documents which should have been drawn up and executed are "confidential information" within the mean-

ing of Rule 4(a). Rule 4(b) prohibits the lawyer from revealing confidential information except as permitted by Rule 4(c). In this situation it would appear that Lawyer L is, in the absence of specific instructions to the contrary, implicitly authorized to disclose the nature of the problem to the original land owners and suggest corrective action under Rule 4(c)(1). If, however, the mobile home sales organization has forbidden disclosure, Lawyer L is obligated to maintain confidentiality. Since it is apparent that suffering the mistake to continue uncorrected would ultimately cause inconvenience, expense, and perhaps injustice, Lawyer L should call upon his client pursuant to Rule 7.2 (b)(1) to rectify the situation and, if the client refuses to do so, Lawyer L should discontinue the representation. It would also appear that Lawyer L might properly contact the original land owners and advise them pursuant to Rule 7.4 (b) that they may wish to secure the advice of independent counsel in regard to the transaction.

## RPC 13

October 24, 1986

### Retirement Agreements

*Opinion rules that a retirement agreement may require a lawyer to accept inactive status as a condition of payment of retirement benefits.*

**Inquiry:**

Attorneys A, B, and C are partners in Law Firm ABC. Partner A desires to retire early at age 60. Partners B and C are willing for A to retire early and to pay A for his interest in the partnership. However, B and C desire to be assured that A will not continue to represent some of the firm's better clients, who are close friends of A. B and C have agreed to pay A for his interest in the partnership if he will voluntarily surrender his license to practice law in North Carolina, thereby preventing him from continuing to represent his friends who are also firm clients.

1. If A voluntarily surrenders his license, may the remaining partners continue to use the name Law Firm ABC?

#### Opinion:

Yes. A law firm may continue to include in the firm name that of a retired attorney who practiced with the firm up to the time of his retirement. Nothing about the continued use of the name Law Firm ABC, after A's retirement, violates Rule 2.3(a), Rule 2.1, or Rule 2.2.

2. If Law Firm ABC continues to use the same firm name after A's retirement, and if Law Firm ABC lists A's name individually on their letterhead where individual firm members and associates are listed, is the Firm required to indicate by A's name that he is retired?

#### Opinion:

Yes. To list A's name individually, where individual firm partners and associates are listed, without some indication that he is retired, could

be misleading in violation of Rule 2.3(a) and Rule 2.1.

3. After A's retirement, may the remaining partners pay to A over a period of years an amount of money, or percentage, based either on the gross fees received by the firm from A's former clients or from all firm clients?

#### Opinion:

Yes. Rule 2.7(a) forbids a lawyer to be a party to or participate in an agreement with another lawyer restricting the right of a lawyer to practice law after termination of the relationship "except as a condition to payment of retirement benefits." Once Attorney A retires, a reasonable agreement, assuming there are no legal or constitutional questions about the validity of the agreement, may provide for restriction of Attorney A's right to practice as a condition to payment of retirement benefits. A percentage of fees paid to a retired attorney, either based on specific clients or on all clients, in view of his contribution to the development of the firm as an ongoing practice, is thus implicitly authorized by Rule 2.7(a). Attorney A, in giving up his right to practice law, would in fact be placed upon inactive status under G.S. §84-16, and Rule 3.2 is not in any way applicable since inactive attorneys are not considered nonlawyers.

## RPC 14

October 24, 1986

### County Attorney as Guardian Ad Litem

*Opinion rules that county attorney occasionally advised the Department of Social Services may not act as guardian ad litem in child abuse cases.*

#### Inquiry:

Attorney C is county attorney for County X. As county attorney, C represents the interests of the county at the direction of the five-member Board of Commissioners, who employ him at their pleasure. Occasionally, Attorney C is asked informal questions by County X's Department of Social Services' director. Attorney C is not attorney of record for the Department of Social Services. Nor does he participate as its attorney in any proceedings officially involving the Department of Social Services. However, County X, of course, does provide funding for the operation of the Department of Social Services.

Attorney C considered becoming an appointed Guardian Ad Litem in cases involving abused and neglected children. In some of these cases, the interests of the Department of Social Services may appear to conflict with those of the abused or neglected children. May Attorney C ethically serve as Guardian Ad Litem for abused and neglected children while serving as county attorney for County X?

#### Opinion:

No. Although Attorney C does not provide extensive legal services for the Department of Social Services, he does advise them from time

to time in his capacity as county attorney.

Therefore, he does have a conflict of interest preventing him from serving as Guardian Ad Litem in any proceeding in which the Department of Social Services is or may be involved. See Rule 5.1; see also CPR 171. Nor can he obtain valid, informed consent from the two clients involved. Thus, the representation is barred.

## RPC 15

October 24, 1986

### Communication with Unrepresented Party

*Opinion rules that attorney may interview person with an adverse interest who is unrepresented and make a demand or propose a settlement.*

#### Inquiry:

Attorney A represents Client X, who was seriously injured in an automobile accident. To Attorney A, it appears that proposed defendant Y is clearly liable for the accident. Defendant Y is insured by Z insurance company for the minimum limits of \$25,000.00. The injuries appear to be such as to justify a verdict or judgment at or above the \$25,000.00 insurance limit. Negotiations have gone on between Attorney A and representatives of Company Z and have reached a standstill such that Attorney A feels he may be required to file suit against Defendant Y unless Company Z is forthcoming in paying their entire limits of liability. Investigation reveals that proposed Defendant Y has a modest estate although, given the exemption statutes in force, it may be questionable as to whether pursuing proposed Defendant Y individually would be fruitful.

May Attorney A ethically contact proposed Defendant Y and take a statement from him? Additionally, may Attorney A ethically suggest that Defendant Y demand or strongly urge Company Z to settle as long as the settlement at is at or within policy limits, as it would appear to be in Y's interest to do so? May Attorney A alternatively suggest that proposed defendant Y contact an attorney and indicate that that attorney may give Y advice to demand that company Z pay their policy limits?

#### Opinion:

Rule 7.4 forbids a lawyer representing a client to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter. However, there is no prohibition generally on communicating directly with an adverse party who is not represented by counsel. Thus, since it appears that proposed Defendant Y is not currently represented by counsel, Attorney A may communicate with him concerning proposed Defendant Y's statement about the automobile accident. Additionally, Rule 7.4(b) prohibits a lawyer from giving advice to a person not represented by a lawyer, other than advising that person to secure counsel, where the interests of the person have a reasonable possibility of being in

conflict with the interests of the lawyer's client. Clearly, the interests of proposed Defendant Y have a possibility of being in conflict with the interests of Attorney A's Client X. Attorney A should not advise proposed Defendant Y to demand that insurance company Z settle the claim for the limits of the policy. However, he may certainly advise proposed Defendant Y to consult an attorney in connection with the claim and certainly may communicate with proposed Defendant Y, as an adverse party not represented by counsel, that his client's position is that Y is totally at fault and may make a demand or propose a settlement.

## RPC 16

October 24, 1986

### Files of a Deceased Lawyer

*Opinion rules that a lawyer appointed conservator of a deceased lawyer's files should comply with the instructions of the court and seek to preserve valuable documents and confidential information.*

#### Inquiry:

Attorney A represents Client W, the widow of Attorney Y. Attorney Y practiced law in the area for approximately twenty-five years, during which time he accumulated numerous files. Attorney A has been appointed conservator of Attorney Y's files by the senior resident Superior Court Judge. As conservator, and counsel for Client W, Attorney A contacted each of Attorney Y's clients who had active files in his office at the time of Attorney Y's death. Most of those clients have picked up their files.

Attorney Y was associated with one other lawyer at the time of his death. Shortly after Y's death, that other lawyer opened up his own practice in a separate building.

Client W is planning to sell the office building where Y's practice was located and needs to do something with the numerous files that were accumulated over the years. Specifically, is the estate authorized to file these files in another attorney's office or in the Clerk's Office if such accommodations can be arranged? If those accommodations cannot be arranged, must the estate store these files indefinitely? Can the estate attempt to notify the clients involved by legal advertisement in the paper and then physically destroy all files not picked up in a reasonable period of time? Attorney A is concerned about problems of client confidentiality if files are turned over to another law firm. Attorney A is also concerned about the loss of valuable documents if files are shredded and destroyed.

What may Attorney A ethically do to handle the problem of Y's files?

#### Opinion:

The Bar cannot speak as to what the estate may or may not do as the estate is not an attorney bound by the Rules of Professional Conduct. Nor is Attorney Y's widow subject to the

Rules. Nor can the Bar speak to any legal questions of the client's rights to their files.

Attorney A, as counsel for W and as conservator of Y's files, should seek to advise W reasonably according to any potential obligations she may have and should seek direction and approval from the court which appointed him conservator. There appear to be few ethics opinions dealing with ultimate disposition of the files of a deceased lawyer, particularly inactive files. On the other hand, many jurisdictions have dealt with the question of what an attorney or firm may do with their own files which become inactive and have recognized that even an attorney in active practice is not required to retain entire files indefinitely. Generally, opinions have suggested that an attorney concerned with his own files may notify clients that inactive files may be destroyed within a reasonable period of time if the client does not pick up the file or direct that it be transferred to another attorney. In destroying files, opinions have generally suggested that attorneys should not destroy items which actually belong to the client, information useful in the assertion or defense of a client's position in a matter for which the statute of limitations has not expired, or information which the client may need, does not already have, and which is not readily available otherwise. Generally, attorneys should also retain accounts or records of their receipts or disbursements and an index or identification of destroyed files. In determining what should be destroyed, the files should be screened and determinations made according to the nature and contents of those files. See ABA Informal Opinion 1384 (March 14, 1977); Kentucky Bar Association Opinion E-300 (January 11, 1985); New York City Bar Association Opinion 82-15 (February 6, 1985); Maryland Opinion 85-77, 801 ABA/BNA Lawyer's Manual on Professional Conduct at 4359.

As an attorney, Attorney A is not in the same position as he would be with regard to the disposition of his own files, but should have due regard to the considerations involved in disposition of files of an attorney. Thus, Attorney A should take note of confidential information as governed by Rule 4 of the Rules of Professional Conduct and should avoid simply transferring a case to another attorney, without the client's instruction or consent, for handling by that other attorney. Storage in a reasonable location, whether in another attorney's office or elsewhere, would certainly be appropriate. Otherwise, Attorney A should comply with the direction of the court which appointed him conservator and follow his personal conscience and sense of professional responsibility in making every effort to see that files are dealt with appropriately.

## RPC 17

October 24, 1986

### Reporting Unethical Conduct

*Opinion rules that a lawyer who acquires knowledge of apparent misconduct must report this matter to the State Bar.*

#### Inquiry:

Attorney A conducted a title search on a tract of property for a client, the vendee. Attorney A discovered an outstanding lien of \$5000 on the land in question. The client's payments to the vendor covered most of the lien. However, the attorney still needed \$1000 from the vendor to clear up the title. The vendor asked if he could bring the remaining \$1000 to Attorney A within a week. The vendor had been a good client of Attorney A in other matters, and Attorney A agreed to the vendor's request. In the meantime, Attorney A closed the deal, writing up a general warranty deed, with the \$1000 outstanding. In addition, because the vendee purchased the land through a bank loan and used the land as security on that loan, the vendee had to sign an affidavit stating that there were no prior encumbrances. This he did presumably relying on his lawyer's advice.

1. If Lawyer L becomes aware of the situation described above, is he under any duty to report Attorney A's conduct to the North Carolina State Bar? Does it affect the response if Attorney A agrees to put the \$1000 into an interest-bearing escrow account in the vendee's name?

#### Opinion:

On the basis of the facts stated, there appears to be reason to believe that Attorney A may have violated Rule 1.2(b), Rule 7.1(a)(3) and possibly Rule 5.1. If Lawyer L has knowledge that Attorney A has committed these violations, Lawyer L must report the apparent misconduct to the State Bar under Rule 1.3(a). Whether Attorney A agrees to deposit the \$1000 into an escrow account in the vendee's name does not affect whether the violation has occurred and whether Lawyer L has knowledge that it occurred, but would be more relevant to any legal claims the vendee would have against Attorney A and possibly in consideration as to actual discipline to be imposed by the State Bar if it found the facts as believed by Lawyer L and found them to establish unethical conduct by Attorney A.

2. The same vendor, as in the circumstances above, has been accused of working privately in partnership with a loan officer at the bank involved in the transaction described above and of obtaining a large loan from that bank for the stated purpose of construction work on the property. According to third parties, the vendor, who is the construction company president, drew on the loans when there was no construction actually going on.

Additionally, the vendor allowed additional liens to build up on the property to pay for con-

struction work which did actually occur. Although the company is contractually obligated to clear up the subsequent liens, the company in fact no longer exists. The former owner-president has indicated that he will not honor the contract and pay off the liens. He has also refused to pay liquidated damages for which the contract provides even though he was over a year late finishing up the project.

At the time the vendor sold the property and signed the construction contract, his company had been officially suspended by the Secretary of State of North Carolina for failure to pay license fees. The loan officer mentioned above has left the bank and cannot be located.

At what point, if any, must the investigating attorney, Lawyer L, report the activities of the vendor to the State Attorney General? What degree of certainty regarding the truth of the allegations is necessary before any steps are taken to report this case to the Attorney General?

#### **Opinion:**

The Rules of Professional Conduct do not speak to whether an attorney must report possible illegal conduct to law enforcement officers and public officials. These matters are left to the judgment of the attorney in question with due regard to any laws which may be relevant and to his professional judgment and conscience.

## **RPC 18**

January 16, 1987

### **Representation of Corporation in Derivative Action**

*Opinion rules that a law firm may not simultaneously represent shareholders in a derivative action and the corporation's landlord on a claim for back rent.*

#### **Inquiry:**

Two minority shareholders and an attorney from Law Firm B went to the principal place of business of a corporation to review corporate records. Law Firm A, on behalf of the corporation and its president, brought suit against the two minority shareholders for trespass and invasion of privacy. It is undisputed that one of the two minority shareholders was an officer and director of the corporation at the time of the inspection. Prior to answering the Complaint filed by Law Firm A, the two minority shareholders were elected as officers and directors of the corporation by a unanimous vote at the annual meeting of shareholders and directors. In addition, at that meeting the minority shareholders moved that the corporation sue its president for mismanagement, but that motion was defeated by a majority vote of the directors, who were controlled by the president. Law Firm B filed a counterclaim against the corporation and its president, praying for independent relief for the minority shareholders and derivative relief for the corporation. Thereafter, the president called a special meeting of the shareholders and

directors to vote on a salary increase for himself and to consider disposition of a claim for back rent from the landlord of the corporate premises. The two minority shareholders and directors voted against a salary increase on the ground that the president admitted owing in excess of \$50,000 to the corporation for unauthorized loans. Additionally, at that special meeting the minority shareholders were told for the first time of the landlord's claim for back rent. Subsequently, the landlord retained Law Firm B to file an action against the corporation for the rent arrearage. Full disclosure was made to the landlord and the minority shareholders, and all desired continued representation by Law Firm B. Since the filing of the Reply to the counterclaim, the Court has ordered that all the other directors and officers of the corporation be brought in as additional party defendants. Law Firm A has entered an appearance for a number of the other directors and officers.

May Law Firm B ethically represent both the landlord and the minority shareholders under the facts stated?

#### **Opinion:**

No. Law Firm B may not ethically continue to represent both the minority shareholders on behalf of the corporation in the derivative action and also continue to represent the landlord in the landlord's action for back rent. Law firm B is effectively representing the corporation in the derivative action and, at the same time, representing the landlord in that claim against the corporation. Rule 5.10 and the comment clearly establish that Law Firm B's obligation is to the corporation in the derivative action, not simply to the minority shareholders who employed it to bring the derivative action.

While informed consent in the ordinary situation will permit representation of multiple parties with conflicting interests, it will not override the conflict unless the attorney in question reasonably believes representation of the other client, in each instance, will not be adversely affected. See Rule 5.1(a), (b). Since Law Firm B is effectively acting on behalf of the corporation in the derivative action, and since the issue of back rent claimed by the landlord appears to be entangled with the issues involved in the claims and counterclaims in the suit between the minority shareholders on the one hand in the derivative action and between the corporation and its president on the other hand, there is serious doubt as to the effectiveness of the consent of the minority shareholders to permit representation of the otherwise conflicting interests, and it does not appear that representation of both clients may reasonably be undertaken without a threat to the interest of one of the other clients and to the sanctity of confidential communications protected by Rule 4. Which, if any, party Law Firm B may continue to represent will depend upon the availability of informed consent from any of the parties, the relevance of confidential informa-

tion, within the meaning of Rule 4, received by Law Firm B in its current representation of the minority shareholders and effectively of the corporation in the derivative action and in its representation of the landlord, and on the Court's judgment in the exercise of its inherent authority. See *Swenson v. Thibaut*, 39 NC App. 77, 250 S.E. 2d 279 (1978), cert. denied and appeal dismissed, 296 NC 740, 254 S.E. 2d 181 (1979), G.S.55-55.

## **RPC 19**

January 16, 1987

### **The Lawyer and His Secretary as Witnesses**

*Opinion rules that a lawyer may represent grantees of deeds he drafted even though his secretary may be called as a witness.*

#### **Inquiry:**

Over a 10-year period, Attorney A drafted eight deeds under the provisions of which X, a widow, conveyed to Y and Z, husband and wife and unrelated neighbors, various tracts or parcels of land. Six of the eight instruments were notarized by a secretary employed by Attorney A's firm. On two of the six occasions, Attorney A went with his secretary, the notary, to the home of the grantor to explain the instruments.

In each instance, the grantees, or one of the grantees, initially came to Attorney A to have him draft the deed. The grantee paid Attorney A for drafting each of the deeds. Attorney A never represented the grantor in any other legal matter and did not purport to represent the grantor with regard to these deeds except that he did undertake to go over some of the provisions of two of the deeds.

The grantor is now deceased. Three of her grandchildren have instituted a suit seeking to set aside all eight deeds on the grounds of lack of mental capacity on the part of the grantor and undue influence exerted upon the grantor by the grantees. Approximately 50 witnesses have been interviewed and will testify to facts tending to refute the allegations made by the plaintiffs. Y and Z desire that Attorney A represent them with regard plaintiff's suit. Attorney A has explained to Y and Z that he would not be able to accept employment on their behalf and then voluntarily testify on their behalf as a witness. Attorney A believes that there are many other witnesses who can ably and better testify on behalf of Y and Z to the issues of the grantor's mental capacity and to refute the undue influence allegations. Attorney A has also explained to Y and Z that it is his opinion that his secretary, who notarized six of these instruments, could testify if he represented Y and Z. Attorney A recognizes some possibility that he might be called as a witness by plaintiffs, but he believes this possibility to be very unlikely.

May Attorney A ethically accept employment by Y and Z to defend them and represent their interests in the proceeding to set aside the deeds on the grounds of the grantor's alleged lack of

mental capacity and alleged undue influence exerted upon the grantor by the grantees, given the fact that Attorney A drafted the deeds, was present when two of them were executed, and that a secretary from his firm notarized six of the deeds and would probably need to be called as a witness by Y and Z as to the condition of the grantor at the time of execution of those six deeds? Could Attorney A, if he undertook this employment on behalf of Y and Z, ethically represent them and call a secretary for his law firm as a witness on behalf of Y and Z and permit her to testify as to the mental capacity of the grantor and also permit her to testify that Attorney A was present and explained the content of the instruments to the grantor on two occasions? Would it be proper for Attorney A to accept the employment by Y and Z if the secretary (notary) employed by his firm was not called as a witness by his clients, but with the knowledge that he would probably be called as a witness on behalf of plaintiffs?

#### **Opinion:**

Yes. Attorney A may ethically represent Y and Z in the proceeding instituted by the grantor's grandchildren to set aside the eight deeds in question, under the anticipated circumstances. While Rule 5.2 prohibits a lawyer from accepting employment in most instances if he knows or if it is obvious that either he or another lawyer in his firm ought to be called as a witness for either side, neither Rule 5.2 nor any other Rule speaks to prohibiting representation when an employee in the firm will probably be called as a witness. The comment indicates that the underlying justification for Rule 5.2 relates to the conflict between the dual roles of advocate and witness, a conflict which does not exist for this secretary since she does not appear and participate as advocate. The prohibition on accepting employment only applies if the lawyer "knows or it is obvious that he or a lawyer in his firm ought to be called as a witness..." Rule 5.2(a). In this instance, it appears highly unlikely that Attorney A would be called as a witness since there are numerous other witnesses who can testify to the issues of mental capacity and undue influence, or lack thereof, on behalf of Y and Z. In addition, Attorney A believes that it is highly unlikely that plaintiffs would call him as a witness, a belief which appears to be reasonable under the circumstances. Of course, if Attorney A accepts the employment and it subsequently develops that he will or should be called as a witness on either side, he would then have to govern his conduct by Rule 5.2(b) or (c).

## **RPC 20**

January 16, 1987

### **Solicitation of Business Clients**

*Opinion rules that a lawyer may not use an intermediary to solicit business clients, may not make "cold calls" upon prospective business cli-*

*ents and may not make statements in legitimate communications which are prohibited by Rule 2.1.*

#### **Inquiry #1:**

May an attorney or law firm in North Carolina call someone at a bank or an accounting firm and specifically suggest that the institution set up a meeting between the attorney or the law firm and a company with which that attorney or law firm has had no prior relationship, for the purposes of soliciting the business of the company for the attorney or law firm?

#### **Opinion #1:**

No. Rule 2.4(a) specifically prohibits a lawyer from soliciting professional employment from a prospective client where there has been no family or prior professional relationship if a significant motive for the lawyer's doing so is his pecuniary gain. That the attorney or law firm approaches the prospective client's bank or accounting firm first does not insulate the solicitation from the prohibition of Rule 2.4(a).

#### **Inquiry #2:**

May an attorney or law firm in North Carolina utilize the technique of "cold calls" in attempting to cause a company to employ that attorney or law firm?

#### **Opinion #2:**

No. "Cold calls" made in an attempt to cause a company to employ the attorney or law firm directly violate Rule 2.4(a).

#### **Inquiry #3:**

When an attorney or law firm is talking to a potential client, having caused the meeting by one of the above-described methods, and when the potential client is already represented by another attorney or law firm, may the attorney or law firm state or suggest any of the following:

- a. That the law firm presently representing the company is inadequate in size or quality to perform services for the company?
- b. That the law firm presently representing the company does not have adequate expertise in certain areas that the company may need?
- c. That the interviewing law firm would charge less than the present law firm?

#### **Opinion #3:**

If an attorney or representatives of a law firm are talking to a potential client after setting up a meeting in one of the above described methods, the attorney or law firm, of course, is engaging in a prohibited solicitation. Assuming that an attorney or law firm were speaking to a potential client under circumstances not necessarily in violation of the Rules of Professional Conduct, such as where the potential client sought out the attorney or law firm, the statements which may ethically be made are restricted by Rule 2.1. In particular, the attorney or law firm discussing possible representation with a potential client already represented by a different attorney or firm is prohibited from making statements which compare that lawyer's services with those of other lawyers unless the comparison can be factually substantiated. Rule 2.1(c). It may be

very difficult to substantiate the type of statements listed above as a small firm may be able to provide services by concentration of their time upon the needs of the particular client and may be able to develop expertise as needed. If the interviewing law firm would in fact charge less than the present law firm, it would not be unethical to say so provided that the interviewing law firm has sufficient knowledge to say so.

## **RPC 21**

April 17, 1987

### **Sending Demand Letter on Behalf of Unidentified Client**

*Opinion rules that a lawyer may send a demand letter to the adverse party without identifying the client by name.*

#### **Inquiry:**

Attorney A is a staff attorney in a federally funded legal services program established for the purpose of providing legal services to migrant farmworkers. Attorney A is representing a migrant farmworker with minimum wage claims pursuant to the Fair Labor Standards Act and a claim for liquidated damages pursuant to the Migrant and Seasonal Agricultural Worker Protection Act. It is the independent judgment of Attorney A that the disclosure of the identity of his client in the initial demand letter to the employer-adverse party could reasonably be expected to subject the client to the possibility of physical or economic retaliation. Attorney A is fully prepared to disclose the identity of his client to the adverse party if a realistic possibility of settlement of the claim seems likely during subsequent communication with the adverse party or his counsel. Would it be ethical for Attorney A to write an initial demand letter to the employer-adverse party inviting settlement discussions without disclosing the name of the client?

#### **Opinion:**

Yes. Nothing in the Rules of Professional Conduct prohibits negotiating on behalf of an undisclosed principal. In the subject situation, the identity of the client would be "confidential information" subject to the protection of Rule 4 of the Rules of Professional Conduct because its disclosure would be likely to be detrimental to the client. Attorney A would have an obligation not to disclose the client's identity until authorized to do so by the client or until otherwise permitted to do so by the Rule. No other provision of the Rules of Professional Conduct would be offended or compromised by the conduct proposed, assuming that the client actually exists and has authorized the communication made on his or her behalf.

## RPC 22

April 17, 1987

### Representation of Administratrix in Official and Individual Capacities

*Opinion rules that in the absence of consent from the heirs, a lawyer may not represent the administratrix officially and personally where her interests in the two roles are in conflict.*

#### Inquiry:

Intestate person I died in North Carolina in 1984, leaving as statutory heirs his second wife B and two minor children, M and N, from a previous marriage in Virginia which ended in divorce in 1979. Wife B, represented by Attorney X, qualified as Administratrix in North Carolina, survived a challenge for removal for cause by Creditor 1, and continues as Administratrix in the open estate.

Among other claims on the estate, Creditor 1, a secured and unsecured lender, has brought suit on a refusal to pay a claim based on deeds of trust and notes signed by both I and B as well as on unsecured credit extensions. Creditor 2, the ex-wife of I, has filed suit for breach of contract based on the failure of I to provide college tuition or a life insurance policy to provide college tuition, pursuant to a separation agreement executed by I in Virginia. The guardian ad litem for M and N is a party plaintiff in Creditor 2's suit. Both creditors' suits name the Administratrix in both her official capacity and personally as parties defendant because of the refusal of the Administratrix to refer the claims, seeking costs from her in both capacities under GS Section 28A-19-18.

Attorney X has answered Creditor 1's suit for the Administratrix B, both in her official capacity and individually. X has not yet answered the suit of Creditor 2.

May X ethically continue to represent B against Creditor 1's claims in both capacities? May X ethically represent B in both her capacities in the suit by Creditor 2, even if B consents, but M and N do not consent through their guardian ad litem?

#### Opinion:

No, Attorney X may not ethically represent Administratrix B in both her individual and official capacities in the suits brought by Creditor 1 and Creditor 2. Rule 5.1 prohibits a lawyer from undertaking to represent and from continuing to represent clients with adverse interests unless the representation will not be adversely affected and the clients consent after full disclosure. In both suits, the interests of the estate are involved, which includes the interests of the two minor children. In both suits, the interests of Administratrix B as an individual are also involved and may be adverse to the interests of the estate. Without the consent of the heirs, including the minor children, Attorney B cannot represent the Administratrix in both her official and individual capacities where there are conflicts between her interests in the two roles.

## RPC 23

April 17, 1987

### Disclosure of Information Concerning Real Estate Transactions to the IRS

*Opinion rules that a lawyer may disclose information to the IRS concerning a real estate transaction which would otherwise be protected if required to do so by law, and further that notice of such required disclosure, should be given to the client and other affected parties.*

#### Inquiry:

Lawyer L frequently handles real estate transactions for his clients. Lawyer L has reviewed new federal tax law requirements. He believes that, as of January 1, 1987, he is required to file Form 1099 with the Internal Revenue Service for each real estate transfer in which he acts as the closing agent. That form would require that he provide the Internal Revenue Service with the sales price and tax identification numbers for the parties to the real estate transaction.

Lawyer L is concerned that he may be violating client confidences by disclosing the information required by Form 1099 to the Internal Revenue Service. If he must disclose this information, is he required to advise the parties to the transaction that the returns are being filed? Is it necessary to secure the permission of the clients in order to disclose that information?

#### Opinion:

Rule 4(c)(3) permits a lawyer to disclose confidential information if he is required by law to do so. Whenever Lawyer L is required by tax law provisions to provide certain information to the Internal Revenue Service, he may ethically do so. Since it is a legal requirement, the consent of the client, as such, is not required. Rule 6(b)(1) requires a lawyer to keep a client reasonably informed of the status of any matter and to comply promptly with requests for information. The comment thereto indicates that a lawyer is required to "fulfill reasonable client expectations for information . . .". Therefore, Lawyer L and other attorneys similarly situated should inform their clients, and other affected persons as reasonable and appropriate, when the lawyer must provide information to the Internal Revenue Service.

## RPC 24

October 23, 1987

(Editor's Note: This opinion was originally published as RPC 24 (Revised).)

### Purchase of Client's Property at Execution Sale

*Opinion rules that a lawyer may not purchase his client's property at an execution sale on his own account because of conflict of interest.*

#### Inquiry:

Attorney A represents a client whose real or personal property is being sold by the sheriff at an execution sale. The client has instructed the attorney that, regardless of the amount of equity

in the property, the client does not wish to bid on its own behalf, instead hoping that someone else will bid at the execution sale to produce partial or full payment of the outstanding judgment.

Attorney A attends the execution sale, simply to report the results to the client. At the sale it becomes apparent that there will be no bidders. Accordingly, the client will be forced to pay the expenses of the sale and the property will be returned to the judgment debtor. In such a case, Attorney A feels it would benefit the client for Attorney A to bid at the sale if he personally and individually might be interested in purchasing the property. Attorney A believes this would save the client from incurring the expenses of sale and might also produce proceeds which could be used by the client partially or wholly to satisfy the outstanding judgment.

May Attorney A ethically bid on real or personal property of his client being sold at execution sale under the circumstances set out above?

#### Opinion:

No, however it would be appropriate if Attorney A entered his bid with the informed consent of his client having first formed a reasonable belief that his personal interest would not adversely effect the representation and that the transaction would be fair to his client. See Rules 5.1(b) and 5.4(a).

## RPC 25

October 23, 1987

### Listing of Unlicensed Attorney on Letterhead

*Opinion rules that a North Carolina firm may not list a lawyer licensed elsewhere, but not in North Carolina, as "of counsel" or as a "consulting attorney."*

#### Inquiry:

Law Firm LMN would like to establish a formal relationship with Professor P. Professor P is on the faculty of a law school located in North Carolina. P is a nationally recognized expert in the areas of intellectual property and entertainment law. P is licensed to practice law only in the State of Illinois and does not have imminent plans to become licensed in North Carolina.

Law Firm LMN would like to list Professor P on their letterhead as being "of counsel." If he may not be listed of counsel, then Law Firm LMN would like to list P as a "consulting attorney" in the area of entertainment law.

May Law Firm LMN ethically list P on its letterhead either as being "of counsel" or a "consulting attorney"?

#### Opinion:

No. To list Professor P on Law Firm LMN's letterhead would be misleading, since P is not an attorney in North Carolina and since he does not maintain an office and practice in any other jurisdiction in which he is licensed. See Rule 2.3. Special expertise in a subject does not authorize a nonlicensed lawyer to be listed on a letterhead. To list a person trained as an attorney

ney and licensed elsewhere, but not in North Carolina, under a designation which would attempt to indicate his legal expertise would inevitably be misleading and imply that he is an attorney in North Carolina.

## RPC 26

October 23, 1987

### **Sending Letters Soliciting Employment to Community Newcomers**

*Opinion rules that a law firm may not send letters recommending the services of the firm to persons or corporations that have indicated interest in locating in the community to the local Chamber of Commerce*

#### **Inquiry:**

City C's Chamber of Commerce periodically makes available to its members a list of persons who have requested information from the Chamber concerning the business environment in City C and the county in which it is located. That list typically contains over 25 persons or corporations.

Law Firm F has been mailing a form letter to persons on that list. Using word processing, each letter has been addressed directly to the person or corporation whose name appears on the Chamber list as having made an inquiry.

The letter in question basically thanks the individual or corporation for his or its interest in the city and speaks favorably of the city's environment, attitude and circumstances for newcomers. The letter also indicates that Firm F has served the business community in City C for more than 50 years. It includes an indication of the types of legal services that Firm F provides. It also suggests that if the individual corporation decides to become a part of City C's business community, the addressee's decision may involve business and personal transactions in which legal advice will be needed. The letter then indicates that the members of Firm F would be pleased to assist the addressee with these and other legal needs.

May Firm F ethically send letters of the type described above to individuals or corporations whose names appear on the list of the Chamber of Commerce as having made inquiries about City C, with the individual person's or corporation's name as addressee?

#### **Opinion:**

No. Rule 2.4(b) prohibits lawyers from soliciting professional employment from prospective clients by any written form of communication, where a significant motive is the lawyer's financial gain, when there is no family or prior professional relationship. A limited, narrowly-construed exception authorizes written solicitations distributed generally to persons not known to need a particular kind of legal service. The letters here are not distributed generally within the meaning of the exception in Rule 2.4(b).

## RPC 27

July 24, 1987

### **Representing Parties Adverse to Former and Current Clients**

*Opinion rules that a lawyer may represent clients in a medical malpractice action even though one of the potential defendants or a witness and agent for the defendant is a former client in an unrelated matter. Opinion further rules that the lawyer cannot undertake to represent the clients in the medical malpractice matter when he is currently counsel in a divorce proceeding for a potential defendant or an agent and witness for the hospital defendant.*

#### **Inquiry**

Lawyer A is contacted concerning a possible medical malpractice action. With the consent of the prospective clients, Lawyer A consults with Lawyer B, of a different law firm, about associating in the case. Lawyers A and B sign a contract to represent the clients in the medical malpractice case.

Subsequently, Lawyer A learns through investigation of the case that X and Y may be involved in the case as agents of the hospital. X and Y may be named in the complaint as defendants or may simply be involved as non-party agents of the defendant hospital.

Lawyer A represented X in a child custody and support action. Lawyer A's last contact with X was in 1983. Lawyer A has drawn a separation agreement for Y and has filed a divorce complaint on Y's behalf. The divorce action is still pending and could be put on the calendar and resolved at any time. Y has paid lawyer A only 1/8 of the fee due to lawyer A for filing the divorce action.

If lawyer A fully disclosed to the plaintiffs in the medical malpractice matter his involvement concerning X and Y, and if the plaintiffs in the medical malpractice matter give their consent for Lawyer A to continue representing them, and if the divorce action for Y is finalized prior to any medical malpractice suit being filed, may Lawyer A ethically continue to represent the plaintiffs in the medical malpractice matter as cocounsel? Would it make any difference if X and Y give informed consent to Lawyer A's representation of the medical malpractice clients even if it should involve a lawsuit involving X and Y as possible defendants?

It only the hospital is sued, and X and Y are not named as party defendants in the medical malpractice action and would thereby be involved as witnesses as the agents of the hospital defendant, could Lawyer A ethically represent the plaintiffs in the medical malpractice action as cocounsel with Lawyer B?

#### **Opinion:**

Lawyer A does not currently represent X and has had no contact with X since 1983. The medical malpractice action is certainly not the same matter and does not appear in any way to be substantially related to the child custody and sup-

port action in which Lawyer A previously represented X. See Rule 5.1(d). On the facts given, it does not appear likely that any confidential information obtained in Lawyer A's prior representation of X would be violated if Lawyer A now represented the medical malpractice clients.

It appears that Lawyer A currently represents Y. So long as Lawyer A is representing Y, he cannot undertake adverse representation or representation which is likely to be directly adverse to him unless he has consent of Y and the clients in the medical malpractice case and unless he reasonably believes the other representation would not adversely affect Y's interests. Rule 5.1(a). Even if Y is only a witness and agent of the hospital in the medical malpractice matter, the inquiry suggests that Y's motives and/or actions might be in question. He would be a witness subject to cross-examination. It is difficult to see how the loyalty of the lawyer to his client and the full and frank communication which a client should feel free to give to his lawyer can be maintained if the lawyer is simultaneously representing plaintiffs against Y's principal in a malpractice action in which Y would be involved as a witness. See Rule 4 and comment thereto; Rule 5.1(b) and comment to Rule 5.1. Under these circumstances, it does not appear that Lawyer A should undertake to represent the clients in the medical malpractice matter so long as he is representing Y in Y's divorce action.

## RPC 28

July 24, 1987

### **Representation of Estates of Pilot and Passenger**

*Opinion rules that a law firm may ethically represent the estates of both a husband and a wife in an action arising out of a private airplane crash in which both spouses were killed, where the law firm is convinced that the husband/pilot was not negligent in any way and that it would be frivolous for the wife's estate to assert a claim against the husband's estate.*

#### **Inquiry:**

Law firm has been contacted about representing the estates of a husband and wife who were killed in a private airplane crash. Law firm has carefully investigated the collision, and each member of the firm believes that the sole cause of the collision was a serious defect in the plane. Law firm has advised the executor for the wife that there is no evidence that the husband/pilot was negligent and that the law firm believes that making the husband's estate a party to the action brought by the wife's estate would be frivolous and a violation of Rule 11 of the Rules of Civil Procedure.

Law firm has further advised the executor for the wife's estate that it is the usual and typical defense on the part of the defendant automatically to join the pilot as a third party. Law firm believes the facts clearly show there was no negligence on the husband's part. May law firm

ethically represent the estate of the husband as well as that of the wife, even though there probably will be a joinder by the original defendant or the husband's estate?

### Opinion

Yes, provided that informed consent is obtained from both parties. See Rule 5.1(b). This opinion recognizes that law firm has made a judgment that the representation of neither client will be adversely affected, pursuant to Rule 5.1(b)(1). Law firm has a continuing obligation under Rule 5.1(c) to evaluate the potentially conflicting interests. If a conflict does develop, law firm could be required to withdraw from representation of both clients. Rule 5.1(d) and Rule 4(b).

## RPC 29

October 23, 1987

[Editor's Note: This opinion was originally published as RPC 29 (Revised).]

### Purchase and Use of Title Abstracts

*Opinion rules that an attorney may not rely upon title information from a nonlawyer assistant without direct supervision by said attorney.*

### Inquiry:

Attorney picks up a circular for a title or abstract firm, which states that the firm offers title examination services to attorneys for a flat fee of seventy dollars (\$70.00) per tract plus copy costs.

Thereafter, attorney speaks with an employee of the firm who states that she can do a title search on a parcel of real property as above stated. She further states that she will telephone with any problems and that she will send a title summary and copies of the relevant documents. She states that she will not render an opinion on the title.

Attorney then gives her a deed book reference for a tract of land and requests a title examination. Thereafter, attorney received a mailing from the firm which includes the following:

1. Summary page indicating an abbreviated property description, the mortgages or deeds of trust, the tax listing information and judgments;
2. "Link" sheet for one descendant's estate;
3. "Link" sheet for the deeds represented to be in the chain of title with a copy of each deed;
4. City *ad valorem* tax printout signed by a City employee; and
5. Computer printout of the "out" conveyances for two (2) of the parties in the chain of title from the Register of Deeds. (The "out" conveyances for the owners prior to 1982 were listed on the link sheet by the firm's employee because the Registry does not have conveyances prior to such time on the computer.)

Attorney was not telephoned regarding examination or examination process. The firm does not employ an attorney. The work was performed by a nonlicensed person. Attorney did not train or supervise the firm and was not requested to do so. Attorney has no knowledge

regarding the firm's financial standing or liability insurance.

May attorney ethically rely upon the firm's "Abstract" or "Title Search" in rendering title opinions to clients, lenders or title insurance companies?

If so, what duty, if any, does attorney owe to investigate, evaluate, train and/or supervise firm's employees?

### Opinion:

An attorney is responsible under Rule 3.3(a) to ensure that his firm has procedures which will reasonably assure that the conduct of any nonlawyer either employed or retained by that firm "is compatible with the professional obligations of the lawyer..." Further, an attorney may not ethically handle any "legal matter without preparation adequate under the circumstances." Rule 6(a)(2). For an attorney to rely on an abstract or title search by a nonlawyer not supervised by the attorney or the firm does not constitute adequate preparation under the circumstances for rendering of a title opinion or drafting a deed in reliance on the information disclosed by this title abstract or search. An attorney is required to supervise and evaluate the nonlawyer assistant. An attorney relying on nonlawyer assistants, whether employed by his firm or contracted with, must make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the lawyer's professional obligations, including his ethical obligations as required by Rule 3.3(a).

## RPC 30 (Proposed)

[Editor's Note: Proposed RPC 30 was originally published in April of 1987. The Ethics Committee adopted the opinion, but due to an oversight, RPC 30 was not presented to the council for approval. Adoption of the opinion is expected at the April 1995 council meeting.]

### Communication with Represented Criminal Defendant

*Opinion rules that District Attorney may not communicate or cause another to communicate with represented defendant without the defense lawyer's consent.*

### Inquiry:

A criminal defendant, represented by an attorney, initiates personal contact with the district attorney who is prosecuting the charges against him. The criminal defendant tells the district attorney that the attorney representing him is not counsel of his choice, was selected by someone else, and is not representing his interests. The criminal defendant further says that the attorney is advising him to keep quiet and that he (the criminal defendant) believes the attorney is a "watchdog" for other conspirators in the criminal enterprise of which the criminal defendant has been a part. The criminal defendant expresses a willingness and desire to cooperate with the State but says that he will do so only if the State

agrees that his attorney not be told he is cooperating.

May the district attorney engage in a period of communication with, and accept the cooperation of, the criminal defendant, without revealing the communication and cooperation to the criminal defendant's attorney? What should the district attorney do in response to the criminal defendant's contact?

### Opinion:

No, the district attorney may not engage in such discourse with the criminal defendant. The Rules of Professional Conduct prohibit communication and cooperation between the district attorney and a criminal defendant whom the district attorney knows to be represented by counsel. Rule 7.4(a) provides that a lawyer "shall not...(c)ommunicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

However, the district attorney need not, and indeed, should not turn a deaf ear to the criminal defendant's complaint. The Rule does not prohibit confidential discussions with a person seeking another opinion on his legal situation. Rule 7.4, comment. And, in dealing with "a person who is not represented," a lawyer always is permitted to advise the person to secure counsel. Rule 7.4(b). Furthermore a district attorney has a special duty to "(m)ake reasonable efforts to assure that the accused has been advised of the right to and the procedure for obtaining counsel and has been given reasonable opportunity to obtain counsel." Rule 7.3(b).

Thus, confronted with the contact described above, the district attorney should inform the criminal defendant that he has the absolute right to an attorney who will represent only his interests, that he may discharge the attorney who is representing other interests, that the Court will appoint an attorney to represent his interests if he cannot afford to employ one, and that the district attorney will assist in having him brought before the Court so that the discharge and appointment may be accomplished.

The situation is different where the criminal defendant's complaint to the district attorney is that he has no lawyer but that an attorney is claiming to represent him. In that circumstance, ethical considerations do not prohibit communications between the district attorney and the criminal defendant, since Rule 7.4(a) applies only where the district attorney knows the party to be represented by counsel. Even there, however, the district attorney still has a special duty under Rule 7.3(b), to assist the criminal defendant on gaining access to counsel.

In addition, in either situation, the district attorney may have a duty to inform the North Carolina State Bar of the misconduct of the criminal defendant's attorney. Rule 1.3 requires a lawyer to report misconduct when he or

she has "knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." The criminal defendant's allegations, as described in the inquiry, are of misconduct in the extreme, involving possible violations of Rule 1.2(c) (dishonesty and fraud), Rule 1.2(d) (prejudice to the administration of justice), Rule 5.1 (conflicts of interest), Rule 5.6 (fees from third parties), Rule 6(b)(3) (nondiligent representation), and Rule 7.1(a)(2) (prejudice or damage to client). The Rule does not require a lawyer to report "every violation" of the Rules of Professional Conduct, but only those "that a self-regulating profession must vigorously endeavor to prevent." Rule 1.3, comment. Here, the allegations clearly raise "a substantial question" about the attorney's fitness within the meaning of Rule 1.3. If the quality of the allegations and information are sufficient to imbue the district attorney with "knowledge" of violations, rather than a mere suspicion of them, then he must report the attorney to the State Bar.

## RPC 31

July 24, 1987

### Letterhead Listing of "Corresponding" Attorney

*Opinion rules that a law firm in North Carolina may not list on its letterhead a "corresponding" attorney in another location.*

#### Inquiry:

May an attorney licensed in North Carolina show on his letterhead a "Corresponding French Lawyer" or other relationship with an attorney who is not associated in a partnership or professional association and is not of counsel to the firm?

#### Opinion:

No. Rule 2.3(c) prohibits a North Carolina law firm with offices only in North Carolina from listing a person not licensed in this state "as an attorney affiliated with the firm." A relationship such as a "corresponding attorney" is a form of association or affiliation or could be construed as such by the public. This opinion overrules CPR 347.

## RPC 32

January 13, 1989

[Editor's Note: This opinion was originally published as RPC 32 (Revised).]

### Representation of Domestic Client After Representing Both Spouses in Other Matters

*Opinion rules that an attorney who represented a husband and wife in certain matters may not represent the husband against the wife in a domestic action involving alimony and equitable distribution. Opinion further rules that an attorney associated with the firm which represented the husband and wife during mar-*

*riage, but who did not himself represent the husband and wife during that time, may represent the wife in an action involving equitable distribution and alimony if he did not gain any confidential information from or on behalf of the husband.*

#### Inquiry #1:

Lawyer A is a senior partner with the Firm of A, B, and C. Husband and wife employed the services of Lawyer A over a period of approximately 15 years. Lawyer A, during the course of representing husband and wife, prepared wills for husband and wife, was the attorney for the estate of wife's mother, represented their son in connection with several traffic citations, represented the husband and wife in connection with the purchase of three parcels of real property, and advised the husband and wife as to whether they should file a joint bankruptcy petition. The husband and wife did not file a bankruptcy petition.

After the aforementioned services were rendered by Lawyer A on behalf of the husband and wife, the husband and wife separated. Therefore, the husband employed Lawyer A for the purpose of filing a complaint seeking divorce based upon one year's separation. The wife hired Lawyer D who had previously been employed with the Law Firm of A, B, and C to represent her in the domestic action. Lawyer D had never performed any legal services on behalf of husband and wife during his employment with the Firm of A, B, and C. Lawyer D filed an answer and counterclaim seeking an award of temporary and permanent alimony, sequestration of the marital residence and an equitable distribution of the marital property accumulated during the parties' marriage. Lawyer D also filed a motion requesting that Lawyer A withdraw from the case. May Lawyer A ethically continue to represent the husband after the wife contests his continued representation of the husband?

#### Opinion #1:

No. Lawyer A previously represented both the wife and the husband in connection with numerous matters, including preparation of wills, administration of the wife's mother's estate, purchase of three parcels of real property, and advice as to whether they should file a joint bankruptcy petition. These matters all require or involve communication concerning property, income, and matters relevant to the spouses' financial circumstances so that Lawyer A will necessarily have received confidential information relevant to the pending proceedings. Lawyer A is required by Rule 4 neither to reveal confidential information of this client, nor to use confidential information of his client to the disadvantage of that client or for the advantage of a third person. Confidential information includes not only material protected by the attorney-client privilege, but other information gained in the professional relationship which the client either requests that the lawyer not re-

veal or the disclosure of which could be detrimental to the client. Under these circumstances, given the wife's objection to Lawyer A's representation of the husband, Lawyer A may not continue representing the husband in the domestic action which includes a claim for alimony and a request for equitable distribution of marital property.

#### Inquiry #2:

May Lawyer D continue to represent the wife, in light of the fact that he was previously employed with the Firm of A, B, & C during the period of time Lawyer A rendered the legal services described above to both the husband and wife?

#### Opinion #2:

Yes, unless Lawyer D acquired confidential information of the husband's during the period of time that he was with Law Firm A, B, and C. The inquiry states that Lawyer D never represented the husband. If Lawyer D was not aware of any confidential information communicated by the husband or by the wife on behalf of both her and the husband, he would not be prohibited from representing the wife once he is disassociated from Law Firm A, B & C. See Rule 5.1 and comment thereto.

## RPC 33

January 15, 1988

[Editor's Note: This opinion was originally published as RPC 33 (Revised).]

### Disclosure of Client's Alias and Criminal Record

*Opinion rules that an attorney who learns through a privileged communication of his client's alias and prior criminal record may not permit his client to testify under a false name or deny his prior record under oath. If the client does so, the attorney would be required to request the client to disclose the true name or record and, if the client refused, to withdraw pursuant to the rules of the tribunal.*

#### Inquiry:

Attorney A represents Defendant D in a criminal proceeding. In a confidential communication with D, Attorney A discovers that D has been charged under an alias. If D's real identity were known, it would reveal a prior criminal record which could have an impact on sentencing and possibly result in other charges. In this particular case, it would be in the best interest of D to testify in his own behalf.

Does Attorney A have an affirmative duty to disclose the alias? May he have D sworn under the alias? When the district attorney asks the defendant if he has a prior criminal record, must Attorney A withdraw if D denies any record? If asked by the judge to disclose D's prior record, which cannot be accomplished without revealing the alias, must Attorney A withdraw?

#### Opinion:

Prior to any trial court proceedings, Attorney A has no affirmative duty to disclose the Defen-

dant's true name or his criminal record. Indeed, at that point in his representation, Attorney A's duty to his client prohibits his disclosing this confidential information. Rule 4.

In the trial court, however, Attorney A also has a duty to the tribunal. He may not participate in the presentation of perjured testimony, Rule 7.2(a) (4), (5), (6) and (8), nor in the perpetration of a fraud upon the tribunal. Rule 7.2(b) (1). Obviously, trial court events may give rise to a conflict between this duty to deal honestly with the court, and the duty to deal confidentially with the client. Counsel may not sit idly by while a defendant testifies falsely. Rule 7.2(b) (1). And in response to a specific and direct question to counsel by the court, counsel may not misrepresent the defendant's criminal record but is under no ethical obligation to respond.

Prior to trial, Attorney A must anticipate these possible trial events. He must request the Defendant to agree that he will testify truthfully about all matters, including his name and criminal record, if he testifies at all. If the Defendant refuses this request, Attorney A must terminate his representation. If he has formally entered the case, he must undertake to withdraw, prior to trial, in accord with the rules of the tribunal. See Rule 7.2 and comment.

If the Defendant agrees to these requests but, during the trial, testifies falsely with respect to a material matter, including his name and criminal record, Attorney A must call upon the Defendant to correct the false testimony. If the Defendant refuses, Attorney A must undertake to withdraw from the case in accord with the rules of the tribunal. See Rule 7.2(b) (1) and comment.

## RPC 34

January 15, 1988

### Use of the Designation "Of Counsel"

*Opinion rules that an attorney may be designated as "of counsel" to a North Carolina law firm so long as the attorney is licensed in North Carolina and will have a close, in-house association with the firm which does not involve conflicts of interest.*

#### Inquiry:

Lawyer A is a member of the North Carolina Bar and has been a member for about 15 years. Lawyer A is also a member of the Texas Bar and is a partner in Texas Law Firm Y in Houston, Texas. During the years that Lawyer A has lived and worked in Texas, he has maintained a second home in North Carolina and has maintained a personal and professional relationship with Law Firm X. His family moves to North Carolina for the summer and he makes frequent trips to North Carolina throughout the year.

Lawyer A will semi-retire from the Texas practice and will be dividing his time between Texas and North Carolina. He will maintain a permanent office with Law Firm X and will be

in the office for a few days each month and in contact with other attorneys and staff of Law Firm X on a frequent basis. It is anticipated that eventually Lawyer A will retire to North Carolina.

May Lawyer A become "of counsel" to Law Firm X?

#### Opinion

Yes. Nothing in the Rules of Professional Conduct specifically speaks to use of the designation "of counsel." A firm may designate as "of counsel" another attorney who is licensed in North Carolina, and who will have a close, in-house association free and clear from problems of conflict, without violation of Rule 2.3. CPRs 82 and 155 were decided under the Code of Professional Responsibility and were based on provisions not included in the Rules of Professional Conduct. To the extent CPRs 82 and 155 required daily contact or association, they are overruled.

## RPC 35

January 15, 1988

### Contingent Fees for the Collection of "Med-Pay"

*Opinion rules that a lawyer generally may not charge a contingent fee to collect "med-pay."*

#### Inquiry:

May a lawyer ethically enter into a contingent fee contract to collect amounts due under provisions of a liability insurance contract which provide for the payment of the insured's medical expenses up to a certain amount without regard to fault if there is no dispute as to the validity of the medical bills?

#### Opinion:

Contingent fees, like all legal fees, must be reasonable. Rule 2.6(a). Generally it is considered reasonable for lawyers to charge and collect higher fees than would otherwise be permitted in cases where recovery is uncertain and the lawyer's right to be paid is actually contingent upon there being some recovery. Thus, in such situations, a lawyer is justified, within reason, in computing a fee by applying a relatively high percentage rate to any amounts recovered for the client.

There is generally no justification for extraordinarily high fees where there is no risk of non-payment. In order for such contingent fees to be reasonable and therefore permissible, there must exist at the time the agreement is made some real uncertainty as to whether there will be a recovery.

In most situations where claims are made under the medical payments provisions of liability insurance policies, there is no significant risk that the insurance company will refuse payment. There are no questions of fault to be determined and there is seldom any dispute regarding the validity of medical expenses. The element of risk which is necessary to justify the

typically elevated contingent fee is not present. Such a fee would therefore be unreasonable to the extent that it bears no relation to the cost to the attorney of providing the service or the value of the service to the client. The same analysis would apply to other types of claims with respect to which liability is clear and there is no real dispute as to the amount due the claimant, such as claims for health insurance benefits and life insurance proceeds.

It is not unethical for the attorney to make some reasonable charge for services rendered in regard to the collection of such claims.

## RPC 36

April 15, 1988

### Seminars Produced by Law Firms for Prospective Clients

*Opinion rules that a law firm may hold a seminar concerning automobile accident claims for members of the public who are randomly selected for invitation.*

#### Inquiry:

Lawyer A desires to invite members of the public to a periodically held seminar with refreshments at his office where the public would be given demonstrations and/or information with respect to what to do in case of an automobile accident. Can Lawyer A hold such seminars? If so, can he have his staff mail invitations to the general public either by using names from the phone book or by bulk occupant mailing? Could the attorney ethically invite members of the general public to these seminars by randomly selecting people through the telephone book and having staff, employees or an outside phone service call them with an invitation to attend such seminars or demonstrations?

#### Opinion:

Yes, Lawyer A may hold such seminars. However, he cannot, personally or through any staff, employees or outside agency, telephone persons to invite them to such seminars or demonstrations. Rule 2.4(b). Since the goal of such seminars or demonstrations would be to invite an employment relationship, soliciting persons to come to the seminar demonstration would be equivalent to soliciting professional employment from those persons. He could invite such persons by mailing invitations to persons selected randomly from the telephone directory or by bulk occupant mailing. He could not preselect the people by any means which would target persons specifically likely to need such legal services. Rule 2.4(b)

## RPC 37

April 15, 1988

### Application of Trust Funds to Client's Fee Obligation

*Opinion rules that a law firm which has received money representing the refund of an ap-*

peal bond to a client owing substantial fees to the firm may apply the appeal bond refund to the fees if an agreement with the client would authorize the firm to do so.

#### **Inquiry:**

Several years ago, law firm ABC represented client P in connection with the defense of a lawsuit filed against P. The trial resulted in an adverse verdict for client P, and P instructed the firm to perfect an appeal to the North Carolina Court of Appeals. The Court of Appeals affirmed the Superior Court judgment, and P has since paid the judgment.

After the appeal was affirmed by the Court of Appeals, client P still owed law firm ABC substantial fees. Those fees have not been paid and are unlikely to be satisfied. At a later date, the Office of the Clerk of Superior Court informed law firm ABC that the Clerk's Office was holding a check, which was the return of the appeal bond posted by client P. The money for the appeal bond was brought to law firm ABC's office by P at the time of the notice of appeal and was then deposited with the Clerk's Office by attorneys with firm ABC. Currently, law firm ABC is holding the refunded appeal bond money in its trust account.

May law firm ABC ethically apply the funds from the refund of the appeal bond to the fees still owed to the law firm, which are substantially in excess of the amount of the refund?

#### **Opinion:**

No, unless the agreement or understanding with the client concerning payment of fees and handling of money on behalf of the client authorizes the firm to take its fees or a portion of the fees owing to it from funds held for the client. The firm is required to hold all property or funds owing to its client in a designated trust account, separate from the firm's own funds. See Rules 10.1(a),(c). Funds may be disbursed from that trust account only to the client or in accordance with the client's instructions. See Rule 10.2(E). If a lawyer or firm reached an understanding with a client which would allow it to apply such funds as the refund of an appeal bond to the fees owing from the client to the firm, then disbursement of the refunded appeal bond funds could be made consistent with Rule 10.2(E) to the firm for payment of unsatisfied fee obligation.

### **RPC 38**

April 15, 1988

#### **Temporary Placement of Attorneys**

*Opinion rules that attorneys in North Carolina may use attorney placement services which place independent contracting attorneys with other attorneys or firms needing assistance on a temporary basis for a placement fee.*

#### **Inquiry:**

Attorneys Placement Service, or APS, contracts with independent licensed attorney willing to provide legal services on an hourly basis

for placement of those attorneys with other attorneys, law firms, or corporate counsel needing some assistance temporarily because of lack of time, lack of expertise in a particular area, or other reasons. APS views its role as one of a placement consultant hired by both the employing attorney or firm and the independent attorneys who are placed. APS charges a placement fee which is paid directly by the employing attorneys or firms prior to paying the contracting attorney. The contracting attorney has entered into the arrangement to be paid at a rate equal to the amount paid by the employing attorney minus the placement fee, which is included in the agreement with the employing attorney as being deducted from the total amount paid by the employing attorney.

The attorneys placed by APS are not employed by APS. They are free to accept or decline any temporary position in which APS otherwise is able to place them. APS makes an effort to determine whether there could be a conflict of interest prior to placing any contracting attorney. However, APS also expects the employing attorneys or firms and the contracting attorneys to be sensitive to a possible conflict of interest and to handle any potential conflicts in an ethical manner.

May licensed attorneys in North Carolina ethically contract with APS as either employing attorneys wishing to have other attorneys placed with them on a temporary basis or as contracting attorneys seeking temporary placement with other attorneys or firms?

#### **Opinion:**

Yes. This arrangement does not appear to be structured in any way so as to impinge upon the lawyers' ability to exercise their independent judgment in performing legal services. The contracting attorneys, as well as the employing attorneys or firms, would need to be very careful to avoid any potential conflicts of interest under Rule 5.1 and to preserve confidential information appropriately under Rule 4 in the same way as is necessary whenever an attorney or firm representing a client contracts with another attorney to assist in performance of legal services and representation of the client. Assuming that the contractual arrangements specify what the employing attorney or firm is paying, the rate to be paid to the contracting attorney, and the placement fee to be paid to APS, the arrangement would not violate either Rule 2.6(d) or Rule 3.2.

### **RPC 39**

July 15, 1988

#### **Communication with Adverse Party's Insurer**

*Opinion rules that an attorney may not communicate settlement demands directly to an insurance company which has employed counsel to represent its insured unless that lawyer consents.*

#### **Inquiry:**

Lawyer A is insured against professional malpractice by Insurance Company. Plaintiff sues Lawyer A for malpractice. Insurance Company provides Lawyer B to defend Lawyer A. May Plaintiff's counsel communicate settlement demands to Lawyer B with a copy to Insurance Company?

#### **Opinion:**

No, unless Lawyer B consents. Rule 7.4(a) prohibits a lawyer from communicating regarding the subject of representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. For the purpose of this rule, an insurance company which provides counsel for its insured in the defense of a third party's liability claim is itself a party represented by counsel and may, therefore, not be contacted directly by the third party's lawyer unless the lawyer for the insured and insurer consents.

### **RPC 40**

April 17, 1989

[Editor's Note: This opinion was originally published as RPC 40 (Revised).]

#### **Lender Preparation of Closing Documents**

*Opinion rules that for the purposes of a real estate transaction, an attorney may, with proper notice to the borrower, represent only the lender, and that the lender may prepare the closing documents.*

#### **Inquiry**

Lender A wishes to retain Attorney B to examine the title, render a title opinion, obtain title insurance, record documents and disburse funds at a real estate closing. Lender A will prepare all the necessary documents and states that it will hold Attorney B harmless for all errors in the closing documents. The borrower will be charged a document preparation fee by Lender A and will be notified that Attorney B represents only Lender A.

1. Does Lender A engage in the unauthorized practice of law by preparing the closing documents and charging a fee for this service?

2. Does Attorney B have a duty to notify the borrower of any problems Attorney B detects during the title search?

3. May Lender A waive Attorney B's liability for errors in the closing documents on behalf of itself and the borrower?

#### **Opinion**

1. Lender A has a "primary" interest in the closing documents. Therefore, under the rule of State v. Pledger, 257 N.C. 634, 127 S.E.2d 337 (1962), Lender A may draft these documents without engaging in the unauthorized practice of law.

2. If Attorney B clearly explains to the borrower that he represents only Lender A and makes that disclosure far enough in advance of the closing that the borrower can procure his

own counsel if he wishes, Attorney B will have no duty to notify the borrower of potential defects in the title. CPR 100. It is suggested that any such notice be written.

3. Lender A may not "waive" Attorney B's liability for errors in the closing documents without the borrower's permission to do so.

However, if Attorney B does not draft or review the documents and does not represent the borrower in any respect, it does not appear that Attorney B could be held responsible for errors in the closing documents.

## RPC 41

January 13, 1989

### Lender Preparation of Closing Documents

*Opinion rules that for the purposes of a real estate transaction, an attorney may, with proper notice to the borrower, represent only the lender, and that the lender may prepare the closing documents.*

#### Inquiry:

ABC Co. is a title company which has contracted with a lending institution to provide title insurance and coordinate residential loan closings. ABC Co. wishes to enlist Attorney B as part of a "network" of approved attorneys who will perform closings subject to ABC Co.'s instructions.

All closing documents will be prepared by the lender and forwarded to Attorney B, who will meet with the parties, explain the documents and supervise their execution. Attorney B will then return the documents to ABC Co.

May Attorney B agree to handle closings in this manner?

#### Opinion:

Yes The lender has a primary interest in the closing documents pursuant to *State v. Pledger*, 257 N.C. 634, 127 S.E.2d 337 (1962). Thus, the lender may draft the closing documents and Attorney B will not be assisting the unauthorized practice of law by conducting the closing under these circumstances.

If Attorney B intends only to represent the lender at the closing, he must clearly notify the borrower in time to permit the borrower to obtain other counsel.

## RPC 42

July 15, 1988

### Representation of Interests Adverse to Former Client

*Opinion rules that an attorney may represent a wife in a divorce proceeding against a husband whom the attorney previously represented in a custody proceeding against the husband's first wife.*

#### Inquiry:

Attorney A represented Husband in a custody proceeding against Wife No. 1. At the time Husband was married to Wife No. 2. After the conclusion of the custody proceeding, Wife No.

2 asks Attorney A to represent her in obtaining a divorce from Husband.

May Attorney A represent Wife No. 2 against Husband? Would the answer change if Husband and Wife No. 2 had not been married at the time of the first action between Husband and Wife No. 1?

#### Opinion:

The prior custody proceeding between Husband and Wife No. 1 does not appear to be substantially related to the contemplated divorce action between Husband and Wife No. 2 and therefore Attorney A may represent Wife No. 2. Attorney A may not divulge any confidences or secrets of Husband which Attorney learned during his prior representation, however. If Attorney A cannot adequately represent Wife No. 2 without revealing these confidences or secrets, Attorney A must decline to represent Wife No. 2, or, if he has already taken the case, must withdraw. See Rules 5.1(c) and (d).

Husband's marital status at the time of his action against Wife No. 1 would not, without more, affect the answer to Attorney A's inquiry.

## RPC 43

July 15, 1988

### Advertisement of Board Certification of Specialty

*Opinion rules that an attorney who has been certified as a specialist by the Board of Legal Specialization may so indicate in an advertisement in any way that is not false, deceptive or misleading.*

#### Inquiry:

Attorney A has been certified as a legal specialist in bankruptcy law by the North Carolina State Bar Board of Legal Specialization. The Board's standards list various official designations which board certified specialists may use in advertising. May Attorney A use any variation of these official designations?

#### Opinion:

Yes. So long as the variations are not false, misleading or deceptive, use of such variations does not violate the Rules of Professional Conduct. The United States Supreme Court held that use of nonmisleading variations of official designations for specialists is protected by the First Amendment in *In re RMJ* 455 U.S. 191, 205 (1981).

## RPC 44

July 15, 1988

### Attorney's Obligation to Follow Closing Instructions

*Opinion rules that a closing attorney must follow the lender's closing instruction that closing documents be recorded prior to disbursement.*

#### Inquiry:

Attorney closes loans for a number of real estate clients. After all documents are signed, but before recording, Attorney gives the real estate

agent the commission check and the check for the sellers' proceeds. Attorney then records the necessary documents.

Attorney has been given closing instructions from the lender which require recording before disbursement. Attorney has actually signed a statement to the lender that he will follow the lender's instructions. Attorney is on the approved attorneys' list for a number of title insurance companies who have issued insured closing letters to lenders whose loans attorney closes. The insured closing letter ensures that the attorney will comply with the lender's closing instructions. If a defect in title is discovered by attorney in his title update after disbursement, then the title insurance is liable for that defect. That, in turn, puts attorney's professional liability policy at risk.

Both the realtor and seller have demanded that he disburse funds immediately rather than waiting until later in the day after going to the courthouse to update the title record. The realtor has further stated that the attorney would lose his business unless the funds are disbursed immediately because such is the prevailing practice in the community.

May attorney ethically ignore the lender's closing instruction as well as his commitment to the lender to follow those instructions? Has attorney violated any ethical requirements in disregarding the potential liability that would be imposed upon the title insurance company and/or his professional liability carrier if a defect is discovered after disbursement?

#### Opinion:

No. The attorney may not ethically ignore the lender's instruction that recordation must precede disbursement. CPR 100 made it clear that any attorney involved in the closing of an ordinary residential real property transaction represents both the borrower and the lender in the absence of clear notice to all concerned that such is not the case. Rule 10.2(E) requires a lawyer holding client funds in trust to deliver those funds to interested third persons as directed by the client. In the situation described in the inquiry, it is clear that the attorney, having received funds in trust from his client, the lender, is obliged to disburse those funds at a time which is consistent with the lender's instructions. Moreover, it is fair to say that any lawyer receiving client funds with the present knowledge that he or she does not intend to comply with the instructions for the handling of those funds, would violate Rule 1.2(c) by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.

It should also be noted that the disbursement of loan proceeds before the title is updated and the Deed and Deed of Trust are recorded could be prejudicial, not only to the lender as a client of the attorney, but also to other interested parties in the transaction to whom the lawyer may owe fiduciary duties, such as the title insurer and his own liability insurance carrier. Such

conduct, at least insofar as the client is concerned, could be viewed as prejudicial to the client and thus a violation of Rule 7.1(a)(3).

## RPC 45

July 15, 1988

### Partner Represented Adverse Parties Prior to Joining Firm

*Opinion rules that attorney whose partner represented the adverse party prior to joining the firm is not disqualified unless the partner acquired confidential information material to the current dispute.*

#### Inquiry:

A represents H in a domestic dispute with W. In 1977, A's current partner B, while working for another firm, drafted a will for W. In 1980, B, after joining A's firm, assisted in the settlement of an estate in which W was interested and drafted a timber deed for H and W. A has never previously represented H or W nor any member of their family. A has not received any confidential information regarding W's financial circumstances. B did not bring any files related to the matter he handled for H and W with him when he joined A's firm.

May A continue representing H over W's objection?

#### Opinion:

Yes, assuming that B acquired no confidential information incident to his representation of W prior to joining A's firm which would be material to the current domestic case (Rule 5.11(b)), and, further, that the matters handled by B for W after joining A's firm are not substantially related to the current domestic dispute. Rule 5.1(d).

## RPC 46

October 28, 1988

### Foreclosure and Bankruptcy

*Opinion rules that an attorney acting as trustee in a foreclosure proceeding may not, while serving in that capacity, file a motion to have an automatic stay lifted in the debtor's bankruptcy proceeding.*

#### Inquiry:

If foreclosure proceedings have been instituted against a debtor who later files for bankruptcy, may Attorney A, who serves as trustee in the foreclosure, file a motion in the bankruptcy court to set aside the automatic stay, if the debtor has not contested the noteholder's right to foreclose?

Would the answer to the foregoing inquiry change if, at the time the debtor filed for bankruptcy, any of the following were true: 1) the hearing before the clerk of court in the foreclosure proceeding had not yet been held; 2) the hearing had been held but the 10-day appeal period had not yet run; 3) the 10-day appeal period had expired.

Finally, may Attorney A charge fees for his services pursuant to N.C. Gen. Stat. § 6-21.2?

#### Opinion:

CPR 166 provides that an attorney who serves as trustee may represent neither the lender nor the borrower in a "role of advocacy" in the foreclosure proceeding. So long as the attorney remains trustee, the attorney owes a fiduciary duty to both the borrower and lender. This duty would be violated if the attorney assumed the role of an advocate.

CPR 305 held that the filing of a motion to set aside the automatic bankruptcy stay places the attorney in an adversarial position. Consequently, Attorney A may not properly file such a motion while serving as trustee in the foreclosure. The answer to this inquiry remains the same, regardless of the stage to which the foreclosure had progressed when the debtor filed for bankruptcy.

Finally, the question whether Attorney A may collect legal fees pursuant to N.C. Gen. Stat. § 6.21.2 appears to be moot in view of the above ruling.

## RPC 47

October 28, 1988

### Trust Accounting for Small Sums

*Opinion rules that an attorney who receives from his or her client a small sum of money which is to be used to pay the cost of recording a deed must deposit that money in a trust account.*

#### Inquiry:

Attorney A is employed to draft a deed for Client B who wishes to give a parcel of real property to a relative. It is contemplated that Attorney A will, in addition to drawing the deed, preside over its execution and see that it is properly recorded. Client B is expected to pay a relatively small legal fee along with the cost of recordation at the time the deed is executed. For reasons of cost and convenience, Attorney A would like to ask his client for a single check representing the fee and the cost of recordation and would prefer to deposit that check in his general office account. From that account a single check would be written to the Register of Deeds for the cost of recordation.

Would the procedure described above violate the Rules of Professional Conduct? If so, is there any professionally responsible way of handling such transactions which would not involve an intermediate deposit in the trust account and the necessity of writing multiple checks?

#### Opinion:

Rules 10.1(a) and (c) quite clearly require a lawyer to deposit into his or her trust account all funds received as a fiduciary. This obligation is not in any way diminished when the sum involved is small. Strict segregation of client funds from the personal funds of the lawyer is always necessary to preclude confusion as to

the identity of the funds and to ensure that trust funds are not subject to the claims of the lawyer's creditors or to those of his or her estate.

It should be noted that Rule 10.1(c) further provides that funds received from the client by the lawyer as reimbursement for expenses properly advanced by the lawyer on behalf of the client need not be deposited in the lawyer's trust account. A lawyer handling such transactions could therefore advance funds from his or her general account to pay the cost of recordation and could accept from the client a single check for the legal fee and the advanced expenses and the check could then be deposited directly and finally into the lawyer's general office account.

## RPC 48

October 28, 1988

### Law Firm Dissolution

*Opinion outlines professional responsibilities of lawyers involved in a law firm dissolution.*

#### Inquiry:

What are the ethical responsibilities of lawyers involved in a firm dissolution?

#### Opinion:

The dissolution of a law firm involves four potential areas of ethical concern for the principals involved: (a) the continuity of service to clients; (b) the right of clients to counsel of their choice; (c) the obligation of the principals to deal honestly with each other; (d) the involvement of clients in the disputes of the principals; and (e) the protection of the property of clients entrusted to the firm.

#### A. The Continuity of Service to Clients

Canon VII of the North Carolina Rules of Professional Conduct requires that an attorney represent his or her client zealously. This Canon, and the Rules adopted pursuant to it, require that the attorneys involved in dissolution take care that they continue to fulfill the lawful objectives of their clients.

While the client may have a contractual relationship with the firm, any professional relationships with regard to legal matters are necessarily personal as between the client and at least one identifiable attorney. Any attorney involved in such a professional relationship with a client at the time of dissolution has an obligation to continue the representation, as contemplated by the contract of employment, until the matter is concluded or, until the attorney is required or permitted to withdraw.

#### B. The Right of Clients to Counsel of Their Choice

The attorneys also must take care to notify present clients of the change in the relationship among the attorneys. In giving this notice, the right of clients freely to choose counsel must be preserved. Ideally, the attorneys will agree on the notice to be sent, who sends it, to whom it is sent, and when it is sent. CPR 24. In the absence of agreement, any attorneys in the firm who have had significant professional contact

with the client may send such a notice. Each attorney in the firm who has an ongoing professional relationship with the client has an obligation to see to it that such a notice is sent. Rule 6(b)(1) and (2).

The attorneys must take particular care in notifying a present client for whom the firm is handling a current matter. In addition to notice of the change, such a client should be informed of the status of the matter, the attorney or attorneys who have been working on the matter, and should be asked to select an attorney or attorneys to continue the matter to conclusion. CPR 24, Rule 6(b)(1) and (2). Ideally, this communication to present clients should be sent, by agreement, over the signatures of those attorneys who have had a professional relationship with the client. Any attorney who has had such contact with the client may communicate the information and make the request.

#### **C. The Obligation of the Principals to Deal Honestly With Each Other**

In allocating the firm's personal property, accounts receivable, fees to be received in the future for work in progress, and other assets and liabilities of the firm, the lawyers must deal with each other in compliance with their obligation to refrain from conduct involving dishonesty, fraud, deceit, or misrepresentation. Rule 1.2(c).

#### **D. The Involvement of Clients in the Disputes of the Principals**

If the dissolution gives rise to disputes among the lawyers about their respective rights to the firm's personal property, accounts receivable, fees to be received in the future for work in progress, or other issues, the attorneys should strive to resolve such disputes amicably without involving the clients in negotiations or litigation. If the attorneys are unable to resolve such disputes by agreement, they should resolve them, where possible, by arbitration.

#### **E. The Protection of the Property of Clients Entrusted to the Firm**

A full and complete accounting of all fiduciary property of clients entrusted to the firm should be made to each client, with written request for their return or future disposition. Failure of the client to respond should be taken as a request for the return of said fiduciary property to the client, unless governed by a Court Order or proceeding to the contrary.

### **RPC 49**

January 13, 1989

#### **Real Estate Brokerage Owned by Lawyers**

*Opinion rules that attorneys that own stock in a real estate company may refer clients to the company if such would be in the client's best interest and there is full disclosure, and that such attorneys may not close transactions brokered by the real estate firm.*

#### **Inquiry #1:**

A is the president and majority stockholder of XYZ Realty, Inc., a commercial real estate firm. B, C, and D are attorneys who are a minority shareholders in XYZ, but who are not involved in management of the company.

May B, C, and D refer their legal clients to XYZ Realty, Inc., provided they disclose their status as shareholders in XYZ?

#### **Opinion #1:**

Yes, provided that in addition to disclosing their status as shareholders, Lawyers B, C, and D reasonably believe that dealing with XYZ Realty would be in the best interests of their clients. Rule 5.1 (b) (1) and (2).

#### **Inquiry #2:**

May B, C, and D's law firm close a real estate transaction brokered by XYZ Realty, Inc.?

#### **Opinion #2:**

No. B, C, and D's personal interest in having their realty firm receive its commission could conflict with client's desire to close only when his or her best interest would be served by so doing. This conflict could materially impair the judgment and loyalty of B, C, and D and other members of their firm. In such situations the risk to the client is so great that no lawyer can reasonably proceed, regardless of whether the client wishes to consent. Rule 5.1 (b) and Rule 5.11 (a).

### **RPC 50**

January 13, 1989

#### **Nonrefundable Retainers**

*Opinion rules that a lawyer may charge non-refundable retainers that are reasonable in amount.*

#### **Inquiry:**

May a law firm draft and use a standard fee agreement to be signed by all clients which includes a clause requiring the client to pay a non-refundable retainer in an amount to be determined in each case by the supervising attorney? Is it necessary to distinguish between a retainer and an advance payment or deposit of legal fees?

#### **Opinion:**

A lawyer may charge and collect a nonrefundable retainer as consideration for the exclusive use of the lawyer's services in regard to a particular matter or matters. Rule 10.3, comment. Like all legal fees, a retainer must be reasonable in amount. Rule 2.6(a). Because it is an unusual fee arrangement and one likely to be misunderstood, the lawyer should be careful to offer the client an adequate explanation of the agreement prior to its execution.

Retainers and advance payments should be carefully distinguished. In its truest sense, a retainer is money to which an attorney is immediately entitled and should not be placed in the attorney's trust account. A "retainer" which is actually a deposit by the client of an advance payment of a fee to be billed on an hourly basis

is not a payment to which the attorney is immediately entitled. It is really a security deposit and should be placed in the trust account. As the attorney earns the fee, the funds should be withdrawn from the account.

### **RPC 51**

January 13, 1989

#### **Trust Accounting for Litigation Costs**

*Opinion rules that where a lawyer receives a lump sum payment in advance which is inclusive of the costs of litigation, the portion representing the costs must be deposited in the trust account.*

#### **Inquiry:**

Is it proper for a law firm to contract for a total amount of attorney's fees, all costs inclusive, deposit the entire amount into a general account as fees, and pay all the costs of the action, including filing and process fees out of the general account. Assume that the client has agreed in writing to the above agreement before the receipt of any funds.

#### **Opinion:**

No. Under the circumstances described, some of the money collected by the firm as "fees" would actually be an entrustment intended to defray the costs of litigation. Rules 10.1(a) and (c) require that funds received in the fiduciary capacity, however characterized, be directly deposited into a trust account.

### **RPC 52**

January 13, 1989

#### **Private Employment of Appointed Counsel**

*Opinion describes circumstances under which a lawyer who has been appointed to represent an indigent person may accept payment directly from the client.*

#### **Inquiry:**

May an attorney, after having been appointed to represent an indigent defendant in a criminal case pursuant to G.S. 7A-452, 458, and 459, accept employment by the same defendant in a retained capacity in the same case? If so, under what circumstances?

#### **Opinion:**

Rule .0406(f) of the Rules and Regulations of the North Carolina State Bar Relating to the Appointment of Counsel for Indigent Defendants in Certain Criminal Cases (27 N.C.A.C. 1D .0406(f)) provides that "[C]ounsel appointed for the representation of indigent defendants shall not accept any compensation other than that awarded by the court." This provision, when read in conjunction with Rule 2.6 of Rules of Professional Conduct prohibiting the collection of an "illegal fee," clearly indicates that an appointed counsel may not accept payment from his or her client for professional services. If during the course of the representation, the client indicates to the attorney a desire and the ability to personally employ the attorney's services, it

would be appropriate for the attorney to advise the court of his or her client's desire, seek to be released from responsibility as appointed counsel, and seek to be entered as counsel of record on a retained basis. Because of the tremendous potential for overreaching and to avoid reinforcing the commonly held notion that a privately retained attorney will perform better than appointed counsel, a lawyer who knows or suspects that a client he or she has been appointed to represent is financially capable of employing counsel should never suggest that the client ought to privately employ him or her. Of course if the attorney becomes convinced that the client does not have adequate personal resources to retain private counsel, it would be the attorney's duty under Rule 7.2(b)(1) to call upon his client to reveal that circumstance to the tribunal so that the state might be relieved of the burden of supplying counsel and a fraud on the court avoided. Pursuant to the same rule, the lawyer should, in the event his or her client refuses to permit the disclosure of his or her actual financial situation, move to withdraw.

## RPC 53

January 13, 1989

### Implications of Service on City's Governing Body

*Opinion rules that a lawyer may sue a municipality although his partner serves as a member of its governing body.*

#### Inquiry:

Under Revised CPR 290 an attorney may appear before the governing body of a municipality even though another attorney from the same firm serves as a member of that body. To avoid an unethical conflict, the member must: (1) disclose the relationship, (2) refrain from consideration or comment on the matter, (3) absent himself from meetings during any discussion of the matter, and (4) withdraw from voting on the matter.

Attorney A who represents Contractor, who has a construction contract (awarded through a public bid process) with the City. Attorney B is a member of the governing body of City and a partner in Attorney A's law firm. A dispute arises between City and Contractor concerning performance of, and changes to, the contract, and compensation and damages payable under the contract. At Contractor's request, Attorney A assists Contractor in submitting a claim against the City. When the claim is presented to the governing body of the City for consideration, Attorney B discloses his relationship to Attorney A and takes no part in the consideration, discussion or voting on the matter—all in accordance with Revised CPR 290.

When the governing body of the City votes to deny Contractor's claim, Contractor asks Attorney A to institute a civil action to recover from City the amounts claimed.

Under the same conditions imposed by Revised CPR 290, and assuming appropriate "screening" of Attorney B, may Attorney A continue to represent Contractor in a civil action against City?

#### Opinion:

Yes. The Rules of Professional Conduct would not prohibit Attorney A from representing the contractor against the City in a civil action. In order to avoid the appearance of impropriety Attorney B should be screened within the law firm from any participation whatsoever in the litigation on behalf of the plaintiff. In addition and for the same reason, Attorney B should be apportioned no part of the fee resulting from the prosecution of the litigation. For the purpose of this opinion, it is assumed that Attorney B complied fully with the requirements of revised CPR 290 when the matter was initially being considered by the City Council and that Attorney B will continue to have no involvement in regard to the defense of the litigation in his official capacity.

Under no circumstances should Attorney A undertake the representation of the contractor in litigation where it is necessary that Attorney B be made a party defendant in either his individual or official capacity. In that situation a direct conflict of interest would be engendered and Rule 5.1(a) would compel the disqualification of Attorney A.

## RPC 54

January 13, 1989

### Representation of School Board and Criminal Defendant

*Opinion rules that a lawyer who represents a criminal defendant whose possession property was seized may not without consent seek the property as a fine or forfeiture on behalf of the local School Board.*

#### Inquiry:

Attorney A represents the County Board of Education. Under the terms of G. S. 115C-452 all fines, forfeitures and penalties collected by the General Court of Justice sitting in the county are ultimately paid to local schools. For that reason, it is Attorney A's responsibility to participate in discussions and proceedings relative to fines and forfeitures involving criminal clients in the district and superior courts.

Attorney A also represents criminal clients who, from time to time, are ordered to pay fines, or whose bonds are called and forfeitures are entered.

Attorney A presently represents a criminal client who has been charged in the local Superior Court with trafficking in drugs. Incident to the criminal investigation, the client's home was searched and a large quantity of cash was seized. The money was turned over to federal authorities and held by those federal authorities until the case was tried. The client has consistently denied knowledge of or interest in the

money. The client was found guilty by a jury and gave notice to appeal, which appeal is presently pending. After the trial the money confiscated during the search was turned over to the local sheriff.

May Attorney A, on behalf of the County Board of Education, request that the confiscated money be turned over to the County Board of Education?

#### Opinion:

No, not without the consent of the criminal client. Since it appears that the criminal client, though currently denying any interest in the fund, could have a claim superior to any known party in the event her conviction is overturned and she is ultimately acquitted, Attorney A would be representing an interest in direct conflict were he to initiate formal or informal proceedings directed toward reducing the money in question to the possession of the local Board of Education. However, since the criminal client has consistently maintained that she has no interest in the fund, it would not be inappropriate for Attorney A to seek her consent to his representation of the Board of Education in pursuit of the fund so long as he fully disclosed to her all material facts relating to the matter.

## RPC 55

January 13, 1989

### Attorney General's Representation of Adverse Interests

*Opinion rules that a member of the Attorney General's staff may prosecute appeals of adverse Medicaid decisions against the Department of Human Resources, which is represented by another member of the Attorney General's staff.*

#### Inquiry:

The N. C. Memorial Hospital is represented by a member of the Attorney General's staff. This attorney is assigned to the administrative section of the Attorney General's office, but is physically located at the hospital. The hospital attorney would like to pursue appeals of denials of Medicaid assistance on behalf of the hospital's patients. These appeals would be brought in the patients' names pursuant to agreements naming the hospital as the patients' attorney in fact.

The Medicaid appeals would be brought against the Department of Human Resources, which is represented by another member of the Attorney General's staff. The DHR attorney is physically located in Raleigh but is assigned to the same section of the Attorney General's office as the hospital attorney. Neither the DHR attorney nor the hospital attorney has access to the other's files.

May the hospital attorney handle the Medicaid appeals? Would the answer be different if the hospital attorney was assigned to a different section within the Attorney General's office?

**Opinion:**

The hospital attorney may represent the patients in Medicaid appeals, provided that there is no sharing of confidential information between the hospital attorney and the DHR attorney. Rule 5.11 imputes the disqualification of one attorney to other attorneys within the same law "firm." The term "firm" is not clearly defined within the rule. Although the comment suggests that the term should be read broadly, at least in some situations, it would be impractical to apply a broad reading of the term to government attorneys.

**RPC 56**

April 14, 1989

**Representation of Insurer and Insureds**

*Opinion rules that a lawyer may represent a plaintiff against an insurance company's insured while defending other persons insured by the company in unrelated matters.*

**Inquiry:**

May Attorney A represent Client B if suit will have to be filed against Defendant Z, who is insured by Insurance Company, if Attorney A is currently defending a number of unrelated matters for Insurance Company and its insureds?

Will the answer change if Attorney A is representing Insurance Company, which is named as a defendant in an unrelated lawsuit?

**Opinion:**

(1) While Attorney A owes some duty of loyalty to Insurance Company in cases in which Attorney A defends insureds of Insurance Company, the insureds, rather than the Insurance Company, are considered to be Attorney A's primary clients. See ABA Informal Opinion 822 (1965). Accordingly, Attorney A may represent Client B, even though Client B anticipates filing suit against an insured of Insurance Company and even though Attorney A routinely defends other insureds of Insurance Company.

(2) Where Insurance Company is a named defendant in a case handled by Attorney A, Attorney A should not agree to represent Client B in a suit against an insured of Insurance Company unless Attorney A reasonably believes that the representation will not adversely affect the interest of Insurance Company and both Client B and Insurance Company consent to the multiple representation after full disclosure of all the risks involved. See Rule 5.1(a).

**RPC 57**

October 20, 1989

**Participation as an Approved Attorney**

*Opinion rules that a lawyer may agree to be on a list of attorneys approved to handle all of a lender's title work.*

**Inquiry:**

Out-of-state Lender wishes to make home mortgage loans available to North Carolina bor-

rowers. Lender wishes to require borrowers to use one of three "approved" North Carolina attorneys to do all the title work on closings on Lender's loans. May a North Carolina attorney agree to be one of these three approved attorneys?

**Opinion:**

An attorney may ethically request lenders and title insurance companies to place him on an approved attorney list. See CPR 104. The attorney may not, however, give any special remuneration to the Lender in return for placing his name on the list. No opinion is expressed as to the legality of the limitation of the number of attorneys on the list.

**RPC 58**

July 14, 1989

[Editor's Note: This opinion was originally published as RPC 58 (Revised).]

**Substitution of Criminal Defense Counsel**

*Opinion rules that another member of a lawyer's firm may substitute for the lawyer in defending a criminal case if there is no prejudice to the client and the client and the court consent.*

**Inquiry:**

Attorney A frequently acts as court-appointed defense counsel for indigent clients. Is there an ethics opinion which requires the court appointed attorney to appear personally on the client's behalf? Would it be improper for another member of Attorney A's firm to appear on the client's behalf as substitute counsel?

**Opinion:**

The Rules of Professional Conduct do not prohibit one of Attorney A's partners from appearing on the client's behalf in a matter to which Attorney A has been assigned, so long as the substitution does not prejudice the client, and so long as the substitution is consented to by the client in open court and the substitution is approved and made by the court.

**RPC 59**

April 14, 1989

**Representation of Insurer and Insured in Declaratory Judgment Action**

*Opinion rules that a lawyer may represent an insurer and its insured as coplaintiffs in a declaratory judgment action.*

**Inquiry:**

This case involves a head-on accident in which the driver (Driver A) at fault was driving a vehicle (Vehicle X) owned by another individual (Owner B). According to Owner B, Driver A took Vehicle X without his permission or consent and without having any reasonable grounds to believe that he could operate the vehicle. In fact, Owner B subsequently reported Vehicle X as being stolen.

Firm F has been retained to represent Owner B in a tort action brought by the occupants of the other vehicle involved in the collision. The

defense to the tort action is lack of agency, lack of permissive use, and lack of any reasonable grounds Driver A could have had to believe he could use the vehicle.

The carrier has also requested that Firm F initiate a declaratory judgment action both in its name and in the name of Owner B to determine whether or not the carrier must provide coverage to Driver A.

Can Firm F, as attorney for the owner in the tort claim, file a DJA naming both the liability carrier and owner as plaintiffs?

**Opinion:**

Yes. In the declaratory judgment action the interests of Owner B and the insurance carrier would not be in conflict.

**RPC 60**

July 14, 1989

**Representation of Police Organization and its Members**

*Opinion rules that subject to general conflict of interest rules, a lawyer may represent police officers who are referred by a professional organization of which they are members on a case-by-case basis and also represent criminal defendants.*

**Inquiry:**

Attorney A is engaged in the general practice of law in North Carolina and occasionally represents criminal defendants. PBA, an organization of police officers, maintains a list of attorneys willing to represent PBA members in civil and criminal matters. Attorneys on the PBA list are not paid a retainer fee, and may accept or reject cases as they arise. The attorneys represent the individual PBA members, although fees are paid by the statewide PBA organization.

I. If Attorney A places his name on the list of attorneys willing to represent PBA members, will he thereby be precluded from representing criminal defendants in any other matter?

II. Will the answer be different if Attorney A simply agrees to handle occasional research projects for the local PBA chapter on matters of general interest, such as employment law?

III. Will the answer be different if Attorney A serves as state and/or local counsel to the PBA chapter as well as undertaking occasional representation as set out in question I?

**Opinion:**

I. Attorney A will not be automatically precluded from representing all criminal defendants simply by placing his name on PBA's list of attorneys willing to handle matters for PBA members. Once Attorney A handles a PBA case, however, he may thereafter be disqualified from representing either a criminal defendant or a PBA member, depending on the particular facts.

For instance, if Attorney A accepts a case on behalf of a PBA member, Rule 5.1(a) would prohibit Attorney A from accepting any suit in

which the client's interests are adverse to those of the PBA member, unless (1) Attorney A can reasonably conclude that he can represent the PBA member and the new client and (2) both clients consent to the multiple representation after full disclosure of the risks involved.

Moreover, Rule 5.1(d) forever precludes Attorney A from representing a second client in a matter substantially related to the matter which Attorney A handled for the PBA member, unless the PBA member consents to the later representation.

II. The same general analysis applies if Attorney A agrees to handle research matters for PBA on a case-by-case basis. In the case of research, however, the client appears to be PBA as an organization, rather than an individual PBA member. Thus, Attorney A may not simultaneously do research for PBA and handle a matter for a client whose interests are adverse to PBA.

III. If Attorney A maintains a continuous relationship with PBA, by serving as its local and/or state counsel, Attorney A may not simultaneously represent any client whose interests are adverse to PBA or its members unless Attorney A (1) reasonably believes that he may adequately represent both clients' interests despite the conflict and (2) both PBA and the other client consent after full disclosure of the conflict and the risks involved.

## RPC 61

July 13, 1990

[Editor's Note: This opinion was originally published as RPC 61 (Revised).]

### Defense Counsel's Right to Interview Minor Prosecuting Witness

*Opinion rules that a defense attorney may interview a child who is the prosecuting witness in a molestation case without the knowledge or consent of the district attorney.*

#### Inquiry:

Vi, a seven-year-old child, is carried by her mother, Eve, to the Duke Pediatric Unit, where physical evidence of sexual abuse is diagnosed, and where Vi reports to the physician that her stepfather, Mo, is the perpetrator. Mo is arrested for felonious sex crimes against his young stepdaughter, Vi. Attorney X is appointed or retained to represent Mo. Eve, mother of Vi, expresses that she sympathizes with her husband, Mo, now in jail, and refuses to believe Vi's accusations. Eve brings Vi to Attorney X's office. May Attorney X interview Vi and obtain a statement without the knowledge or consent of the district attorney?

#### Opinion:

Yes. Rule 7.4(a) of the Rules of Professional Conduct only prohibits communication with a person known to be represented by counsel in regard to the matter in question. The prosecuting witness in a criminal case is not represented, for the purposes of the rule, by the

district attorney. For that reason, the lawyer for the defendant need not obtain the consent of the district attorney to interview the prosecuting witness. Nor may the district attorney instruct the witness not to communicate with the defense lawyer. Rule 7.9(d). However, it would be unethical under Rule 7.4(a) for any attorney to question or interview Vi without first ascertaining whether a guardian ad litem or attorney had been appointed for Vi and, if so, without obtaining the consent of the guardian ad litem or attorney. The defense attorney must be careful to ensure that the prosecuting witness is not intimidated or induced to believe the attorney is disinterested or representing the interests of the witness. Rule 7.4(c). Reasonable efforts must be made immediately to correct any such misunderstanding if such becomes apparent. This is particularly important when the prosecuting witness is a child.

## RPC 62

July 14, 1989

### Disclosure of Client Confidences in Defense of Legal Malpractice Claim

*Opinion rules that an attorney may disclose client confidences necessary to protect her reputation where a claim alleging malpractice is brought by a former client against the insurance company which employed the attorney to represent the former client.*

#### Inquiry:

Insurance Company A hired law firm N to represent client Z in a lawsuit. This representation of Z was provided under reservation of rights, since Insurance Company A contended that various claims in the complaint against Z were not covered by its policy. Z also retained private counsel. Eventually, the lawsuit was settled. Thereafter, Z sought to recover damages against Insurance Company A for, *inter alia*, alleged inadequate representation of Z by law firm N. What confidences of Z, if any, may law firm N reveal to Insurance Company A? Does the answer change if law firm N is still representing Z for the purpose of getting an escrow agreement signed as part of the settlement of the original lawsuit?

#### Opinion:

Rule 4(c)(5) provides that an attorney may reveal confidential information "to the extent the lawyer reasonably believes necessary . . . to respond to allegations in any proceeding concerning the lawyer's representation of the client."

The lawsuit between Insurance Company A and Z is a "proceeding concerning the lawyer's representation" of N. It is not necessary that law firm N be a party to the suit. Law firm N may therefore reveal confidences to the extent necessary to clear its name of the charge of inadequate representation, but should take care not to reveal confidences that are not necessary to its defense. The Rule 4(c)(5) exception to the confidentiality rule applies both to current and for-

mer clients. Therefore, law firm N may reveal confidences necessary to defend itself, even if it is representing Z in the escrow agreement matter.

## RPC 63

July 14, 1989

### Representation of School Board While Serving as County Commissioner

*Opinion rules that attorney may represent the school board while serving as a county commissioner with certain restrictions.*

#### Inquiry #1:

Lawyer L represents the county board of education as its attorney and has recently been elected as a county commissioner. Can Lawyer L or his associate represent the school board? If so, what limitations would Lawyer L have as county commissioner?

#### Opinion #1:

Lawyer L may represent the school board, as may his associate. Lawyer L should not personally represent the school board in any matter coming before the board of commissioners. Should a matter in which Lawyer L's associate is representing the school board be presented to the board of commissioners for decision, Lawyer L should take the following actions prescribed by CPR 290: 1) disclose in writing or in an open meeting to the board of commissioners his relationship to the matter involved, 2) refrain from an expression of opinion, public or private, on, or any formal or informal consideration of, the matter involved, including any communication or other form of contact with other members or staff of the board of commissioners concerning that matter, 3) absent himself from all meetings of the board of commissioners during any discussion or hearing of the matter and 4) withdraw from all voting on the matter, with or without the consent of the board of commissioners. The foregoing steps should be taken whenever a matter is presented to the board of commissioners in which Lawyer L or any member of his firm has a direct or indirect interest.

#### Inquiry #2:

Would service as a county commissioner require Lawyer L to restrict his law practice in other ways?

#### Opinion #2:

Yes. If the board of commissioners is responsible for hiring, firing, promoting or setting the salaries of the county's law enforcement officers, Lawyer L should not represent criminal defendants in cases in which such persons are prosecuting witnesses. CPR 189, 233. Lawyer L's associate would not be so disqualified. CPR 252.

**RPC 64**

**July 14, 1989**  
**Former Trustee's Representation of Purchaser Against Former Debtor**

*Opinion rules that a lawyer who served as a trustee may after foreclosure sue the former debtor on behalf of the purchaser.*

**Inquiry:**  
Attorney is the named trustee of a deed of trust granted by Debtor to secure a debt to Lender. Attorney commences a foreclosure proceeding and conducts a sale at which Bidder enters the high bid. The amount of the bid is sufficient to produce a surplus after satisfying all liens known to Attorney. At the end of the upset period, Bidder timely tenders the amount of the bid, which Attorney deposits in his trust account and from which Attorney promptly satisfies all known liens and expenses of the foreclosure. Later, Attorney records a special warranty deed to Bidder. In the interim, Debtor has wrongfully caused removal of improvements affixed to the subject property, whereupon Bidder asks Attorney to represent Bidder against Debtor. Under these circumstances, if Attorney deposits the surplus with the Clerk, may Attorney then ethically represent Bidder in a tort claim against Debtor (for replevin or damages from conversion) or in a proceeding pursuant to G.S. 45-21.32 to assert a claim for part of the surplus held by the Clerk?

**Opinion:**  
Yes. Since an attorney serving as trustee pursuant to the terms of a deed of trust does not represent the grantor/debtor as an attorney, such an attorney may, after foreclosing, represent the interests of an entity adverse to the grantor/debtor in a cause of action related to the foreclosure without violating Rule 5.1(d).

**RPC 65**

**July 14, 1989**  
**Representation of Codefendants by the Public Defender**

*Opinion rules that the Public Defender's office should be considered as a single law firm and that staff attorneys may not represent codefendants with conflicting interests unless both consent and can be adequately represented.*

**Inquiry:**  
The Public Defender's Office in County Z consists of the Public Defender and several staff lawyers and secretaries. The Public Defender is responsible for assigning the cases to himself and his staff and he sets their salaries, with the approval of the courts. Occasionally, several staff lawyers will work on a single case and staff lawyers often discuss their cases with the other lawyers in the office either informally or at staff meetings. All members of the staff share the same office space and secretaries.

May attorneys A and B of the Public Defender's staff ethically represent codefendants with conflicting interests?

**Opinion:**  
The Public Defender's office should be considered to be the equivalent of a single law firm since its members share office space and clerical staff and are directed by a single individual. Two staff attorneys within a single public defender's office may not represent codefendants with adverse interests unless 1) the attorneys reasonably believe that they may adequately represent both clients' interests and 2) both clients consent after full disclosure of the risks involved. See Rules 5.1(a), 5.11. Determining whether the staff attorneys can "reasonably" conclude that they can adequately represent both codefendants will turn on the particular facts of each case, such as the extent of the conflict between the codefendants and the ability of the attorneys to restrict access to each client's files and confidences.

**RPC 66**

**July 14, 1989**  
**Disposition of Escrowed Funds**

*Opinion rules that an attorney serving as an escrow agent may not disburse in a manner not contemplated by the escrow agreement unless all parties agree.*

**Inquiry:**  
Purchaser entered into a residential construction contract on March 27, 1985 with builder. When the transaction was closed on July 25, 1986, \$1000 was placed in escrow with the closing attorney to be held until a list of items was corrected and then disbursed to the builder.

The builder has failed to correct the items although many requests have been made by the purchaser. From time to time the attorney has urged the builder to resolve the problems with the purchaser but no action has been taken.

The attorney has maintained an escrow account earning interest in the name of the purchaser and the purchaser has now requested that the attorney disburse the escrow account and interest to the purchaser in exchange for an indemnification from the purchaser to the attorney.

After the passage of three years' time on July 25, 1989, and after ninety (90) days' notice to both parties, the attorney would like to transfer the escrow account to the purchaser and assume any civil liability, provided the transfer can be made without violating any ethical standard.

Can the attorney ethically disburse the escrowed funds to the purchaser under such circumstances?

**Opinion:**  
No. Funds received by a lawyer acting as an escrow agent must be maintained in accordance with the trust accounting provisions of Rules 10.1 and 10.2 of the Rules of Professional Conduct. A lawyer/escrow agent stands in a fiduciary relationship with all parties to the escrow

and is obligated to treat each as a client with respect to the funds held in trust. Disbursement of escrowed funds is governed in the first instance by the terms of the escrow agreement which should inform the lawyer as to which "client" is entitled to receive payment and when and in what amounts such payment ought to be made. Rule 10.2 (E). If unforeseen circumstances arise for which no provision was made in the escrow agreement, such as those described in the inquiry, the disposition of the escrowed funds must be agreed upon by the parties or made the subject of a legally binding order prior to the lawyer's release of the escrowed funds. The lawyer may not in concert with only one of the parties to the escrow determine that the funds will be disbursed to that party without the consent of the other interested party.

**RPC 67**

**July 14, 1989**  
**Interviewing Employee of Adverse Corporate Party**

*Opinion rules that an attorney generally may interview a rank and file employee of an adverse corporate party without the knowledge or consent of the corporate party or its counsel.*

**Inquiry:**  
After a workers compensation claim has been filed and the employer is represented by counsel, may the claimant's attorney contact a non-managerial co-employee of the claimant to discuss the circumstances of the alleged accident without obtaining consent of counsel for the employer?

**Opinion:**  
Yes. Rule 7.4(a) of the Rules of Professional Conduct generally prohibits contact with only those employees of a represented corporate party which have managerial responsibility or who have been authorized to speak for the corporation. Rank and file employees whose personal acts or omissions are not at issue may ordinarily be interviewed without the knowledge or consent of the corporate party or its counsel. See CPR 2.

**RPC 68**

**July 14, 1989**  
**Inclusion of Non-Licensed Attorneys in Legal Directory**

*Opinion rules that a firm with offices only in North Carolina may not properly submit biographical information for publication concerning attorneys in the firm who are not licensed in North Carolina.*

**Inquiry:**  
MH Inc. publishes addresses and biographical information concerning attorneys and law firms. Information concerning law firms appears in the MH Inc. publication by geographic location. As to firms with offices in North Carolina and other states, MH Inc. includes information

about all attorney members of the firm, including those not licensed in North Carolina. May MH Inc. publish biographical sketches of attorneys who are members of firms which maintain offices only in North Carolina, if the attorneys are not admitted to the North Carolina Bar and confine their practice exclusively to the federal courts?

**Opinion:**

The Ethics Committee of the North Carolina State Bar has no authority to regulate MH Inc., a non-attorney. At most, the committee can advise what information attorneys may properly submit to MH Inc. for publication. Rule 2.3(c) provides that a law firm maintaining offices in North Carolina may not list the name of an attorney not licensed to practice in the state on its letterhead or in its firm name. The comment to the Rule makes it clear that this prohibition applies to any "firm communication." Therefore, a firm with offices only in North Carolina may not properly submit biographical information to MH Inc. concerning attorneys in the firm who are not licensed in North Carolina.

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## RPC 69

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October 20, 1989

### Payment Of Client Funds To Medical Providers

*Opinion rules that a lawyer must obey the client's instruction not to pay medical providers from the proceeds of settlement in the absence of a valid physician's lien.*

**Inquiry:**

Attorney A represents Client C in a personal injury action. Client C directs Attorney A to seek the cooperation of various medical providers and to inform them that their fees will be paid from the proceeds of any settlement.

Attorney A writes the medical care providers and requests the medical records of Client C. He also requests a statement of charges from the medical providers. Subsequently, the medical providers send copies of Client C's account to Attorney A.

After settlement of the personal injury claim, Client C instructs Attorney A not to pay the medical providers, but to pay those sums directly to her. Client C claims she has a dispute with the medical providers as to the amount owed.

May Attorney A ethically refuse to pay the subject funds directly to Client C?

Would there be a different response to this question if Client C had never directed Attorney A to inform the medical providers that their fees would be paid following Client C's recovery in the personal injury action?

**Opinion:**

Rule 10.2(E) of the North Carolina Rules of Professional Conduct provides that, "[A] lawyer shall promptly pay or deliver to the client or to third persons as directed by the client the funds, securities, or properties belonging to the client

to which the client is entitled in the possession of the lawyer." A lawyer is generally obliged by this rule to disburse settlement proceeds in accordance with his client's instructions. The only exception to this rule arises when the medical provider has managed to perfect a valid physician's lien. In such a situation the lawyer is relieved of any obligation to pay the subject funds to his or her client, and may pay the physician directly if the claim is liquidated, or retain in his or her trust account any amounts in dispute pending resolution of the controversy.

In those cases where the client has authorized the lawyer to represent to the medical provider that the provider's fees will be paid from the proceeds of settlement and thereafter forbids the lawyer to pay the physician, the lawyer is, as the client's agent and trustee of the client's funds, under an obligation to comply with the client's instructions. If the lawyer is of the opinion that he might thereby be facilitating his client's fraud, it would not be inappropriate for the lawyer to advise the medical provider of the client's change of heart in sufficient time for the medical provider to pursue any remedies it might have in anticipation of the disbursement of the settlement proceeds. See Rule 4(c)(4). Should no action be taken by the medical provider within a short specified time, the lawyer would then be obligated to comply with his or her client's instructions. See also *N.C. Baptist Hospitals vs. Mitchell*, 323 N.C. 528 (1989).

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## RPC 70

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October 20, 1989

### Role of the Legal Assistant

*Opinion rules that a legal assistant may communicate and negotiate with a claims adjuster if directly supervised by the attorney for whom he or she works.*

**Inquiry:**

May an attorney permit his legal assistant to communicate and negotiate with the claims adjuster for the adverse party's insurance carrier?

**Opinion:**

Yes, so long as the legal assistant is directly supervised by the attorney for whom he or she works. Rule 3.3(b). Under no circumstances should the legal assistant be permitted to exercise independent legal judgment regarding the value of the case, the advisability of making or accepting any offer of settlement or any other related matter.

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## RPC 71

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October 20, 1989

### Prepaid Legal Service Plans

*Opinion rules, among other things, that an attorney may not accept legal employment by a Prepaid Legal Service Plan owned by the attorney's wife or another member of the attorney's immediate family, if the Plan will market its services by in-person solicitation.*

Prepaid Legal Service Plan A markets its services by 1) in-person solicitation, 2) telemarketing, and 3) targeted direct mail advertisements. It plans to hire an attorney to draft the necessary legal documents used by the Plan.

**Inquiry:**

1. May a lawyer properly provide legal services to Prepaid Legal Service Plan A if the Plan is owned by the lawyer's spouse?

2. Would the answer be different if the attorney providing the legal services for the Plan is a relative of the owner, but not the owner's spouse?

3. Would the answer be different if the Plan was owned by a trust, the beneficiaries of which are the children of the attorney who will be providing legal services for the Plan's participants?

**Opinion:**

1. Rule 2.4(d), which was recently adopted by the N.C. State Bar and approved by the North Carolina Supreme Court, provides that a lawyer may participate in a prepaid service plan which uses in-person or telephone solicitation to market its services, so long as the lawyer does not own or direct the plan.

Where the plan is owned and operated by the lawyer's spouse, there is a substantial likelihood that the lawyer may exert some control or direction of the plan. Moreover, even if the lawyer exerted no actual control over the Plan, the close connection between the lawyer and the spouse-owner could create an appearance of impropriety. Therefore, the lawyer may not participate in a plan owned and operated by the lawyer's spouse and which uses in-person solicitation and/or telemarketing.

This flat prohibition does not extend to the use of targeted direct mail, however. Rule 2.4 permits attorneys to engage in targeted direct mail solicitation except where such practice involves coercion, duress, harassment, compulsion or threats or where the prospective client has indicated a desire not to be solicited or where the communication includes false, misleading, or deceptive statements. Consequently, the attorney may participate in a plan owned and operated by the attorney's spouse and which employs targeted, direct mail, so long as the plan meets the foregoing requirements.

2. The answer will not change if the plan is owned by any members of the attorney's immediate family, such as a parent, sibling, or child.

3. If the plan is owned and operated by a trust over which the attorney has no control or influence, the attorney may provide legal services to the plan, even if the nonlawyer employees of the plan promote the plan by in-person solicitation, telemarketing, and targeted direct mail. The attorney may not, however, personally engage in in-person solicitation or telemarketing.

## RPC 72

October 20, 1989

### Conflicts of Interest

*Opinion rules that an attorney hired by the Bureau of Indian Affairs to prosecute criminal charges before a Tribal Court may represent defendants in state or federal court despite the fact that the defendants have been arrested by members of the Tribal Police Force.*

### Inquiry:

Attorney A has been retained by the Bureau of Indian Affairs, a branch of the federal government, to prosecute misdemeanor criminal charges brought in the Court of Indian Offenses on the Cherokee Indian Reservation. The Court is the judicial arm of the Eastern Band of Cherokee, a recognized Indian tribe still enjoying many of the attributes of its former status as a sovereign nation. Law enforcement on the Cherokee reservation is provided by the Cherokee Indian Police. The tribal police force is funded entirely by the Eastern Band.

Attorney A, as a prosecutor, has no authority to instigate or terminate prosecutions other than for failure of the witnesses to appear or where the complaint fails to allege a criminal violation. Attorney A does not advise or have any authority over the Cherokee Indian Police.

CPR 282, decided on October 15, 1980, held, in part, that an attorney who contracted with the Bureau of Indian Affairs to prosecute criminal actions in a tribal court could not simultaneously represent in federal court criminal defendants who had been arrested by members of the Indian police department on the same reservation where the attorney serves as a part-time prosecutor.

In light of CPR 282, may Attorney A represent criminal defendants in state or federal court who have been arrested by the Cherokee Indian Police?

### Opinion:

Yes. Attorney A is employed by the federal government and the Cherokee Indian Police are employed by the Eastern Band of the Cherokee, a distinct entity. Because Attorney A does not represent the Cherokee Indian Police, no conflict of interest arises when Attorney A cross-examines members of the tribal police pursuant to his representation of criminal defendants.

This situation should be distinguished from the case in which a town attorney who advises members of the town police department, wishes to represent criminal defendants arrested by town police. In such a case, the town attorney represents the town police department and its employees. Consequently, it would create a conflict of interest for the attorney to undertake to represent criminal defendants arrested by town police, since it might become necessary to cross-examine the arresting officer on behalf of the criminal defendant.

To the extent that this opinion is inconsistent with CPR 282, that decision is hereby overruled.

## RPC 73

April 13, 1990

[Editor's Note: This opinion was originally adopted as RPC 73 (Revised).]

### Conflicts of Interests Involving Attorneys for and on Governing Bodies

*Opinion clarifies two lines of authority in prior ethics opinions. Where an attorney serves on a governing body, such as a county commission, the attorney is disqualified from representing criminal defendants where a member of the sheriff's department is a prosecuting witness. The attorney's partners are not disqualified.*

*Where an attorney advises a governing body, such as a county board of commissioners, but is not a commissioner herself, and in that capacity represents the sheriff's department relative to criminal matters, the attorney may not represent criminal defendants if a member of the sheriff's department will be a prosecuting witness. In this situation the attorney's partners would also be disqualified from representing the criminal defendants.*

### Inquiry:

In RPC 63, decided in April 1989, the Ethics Committee discussed potential ethical restrictions imposed upon Lawyer L, who serves as a county commissioner. The Committee held, in part, that Lawyer L should not represent criminal defendants in cases where the county's law enforcement officers are prosecuting witnesses, if the commissioners are responsible for hiring, firing, promoting, or setting the salaries of the officers. CPRs 189 and 233 were cited in support of this opinion. The Committee held, however, that Lawyer L's associates would not be so disqualified, citing CPR 252.

CPR 252, decided on September 27, 1979, held that the partners and associates of an attorney who served on a governing board such as a city council were not automatically disqualified from representing a party to litigation, civil or criminal, in which a police officer of the governmental unit would be a witness, if the governing board is not directly involved in the hiring, firing or setting of salaries of the police officers of that governmental unit.

In April 1989, the Ethics Committee approved an ethics advisory provided to Attorney B, who serves as town attorney and occasionally advises members of the town police department. The advisory provided that no member of Attorney B's firm could represent criminal defendants if members of the town police would be prosecuting witnesses.

In light of CPR 252 and RPC 63, may members of Attorney B's firm represent criminal defendants in cases in which members of the town police force will be prosecuting witnesses?

### Opinion:

No. CPR 252 and RPC 63 hold that an attorney who has some potential influence on the salary or employment prospects of a law

enforcement officer ought not be put in the position of cross-examining that officer. The problem created by this situation is the threat that the law enforcement officer might not feel free to testify truthfully and fully in the face of such an opponent. Presumably, the lawyer's partners and associates, who are not members of the governing board, would have no influence on the law enforcement officer's salary or employment and thus, the disqualification need not extend to them.

The decision rendered in April 1989 to Attorney B and his firm addresses a different factual situation and a different ethical problem. In the problem addressed in the advisory, Attorney B is not a member of a governing board with financial power over law enforcement officers, but is the attorney for a governing body. Under the facts presented, Attorney B advises the police department and, in effect, represents the policemen. If Attorney B undertakes to represent criminal defendants arrested by town police, he is, in effect, simultaneously representing clients with adverse interests. It is presumed that the conflict created by this simultaneous representation is so fundamental that it cannot be waived by consent of the clients. Further, this disqualification is extended by Rule 5.11 to the other members of the attorney's firm. Therefore, the attorney's associates may not represent criminal defendants who were arrested by members of the police force.

If, however, Attorney B represents a governing body but does not represent the police department in criminal matters, neither he nor his partners would be disqualified from representing criminal defendants in cases where police officers are prosecuting witnesses.

## RPC 74

October 20, 1989

### Conflict of Interest Involving a Legal Assistant

*Opinion rules that a firm which employs a paralegal is not disqualified from representing an interest adverse to that of a party represented by the firm for which the paralegal previously worked.*

### Inquiry:

Paralegal P worked for Firm A. While working with Firm A she participated in some degree with the preparation and interviewing of two plaintiff clients. Paralegal P subsequently left Firm A of her own volition.

Firm B hired Paralegal P approximately six months after she left Firm A. Firm B represents a defendant in the case on which Paralegal P had worked while employed with Firm A. Firm B has not allowed Paralegal P to work on the file in any way.

Can Firm B continue to employ Paralegal P or does Paralegal P's previous employment with Firm A create a conflict of interest?

### Opinion:

Firm B may continue to employ Paralegal P and continue in the case but should take extreme care to insure that P is totally screened from participation in the case.

## RPC 75

October 20, 1989

### Disbursement of Client Funds

*Opinion rules that a lawyer may not pay his or her fee or the fee of a physician from funds held in trust for a client without the client's authority.*

#### Inquiry:

Last year Lawyer L began representation of Ms. B for injuries she received in an automobile accident. Since that time Ms. B has failed to cooperate in the processing of her claim, has not given any response to numerous letters, has not returned telephone messages, and has not accepted a certified letter. Lawyer L feels that he is no longer in a position to provide representation to Ms. B based on her lack of cooperation.

The question which has arisen deals with a \$353.00 balance which is maintained in the trust account on behalf of Ms. B. This represents a portion of the medical payments coverage which was received on behalf of Ms. B. Lawyer L generally obtains medical payments coverage for his clients as a courtesy with no deduction of legal fees. However, Lawyer L has spent a great deal of time on this case and feels that he should be entitled to some fee. Additionally, Ms. B has signed a doctor's lien in favor of Dr. K.

Lawyer L has on several occasions written Ms. B asking her to authorize him to disburse this amount to Dr. K for his outstanding expenses and to himself in payment for legal services performed. There has been no response. May Lawyer L ethically take a reasonable legal fee from this balance and forward the remainder to Ms. B's physician for his services?

#### Opinion:

No. Rule 10.2(E) of the Rules of Professional Conduct requires a lawyer holding client funds in trust to pay or deliver those funds only as directed by the client. In this case the client has evidently not offered any direction regarding the disbursement of the funds in question and Lawyer L should therefore continue to hold this money in trust. Although there would appear to be a valid physician's lien against some portion of the trust funds, Lawyer L should refrain from disbursing any money to Doctor K until he obtains his client's consent to pay some or all of the amount billed or is required to pay some liquidated amount by a valid court order. Any funds which are the subject of an ongoing dispute should be retained in trust.

## RPC 76

October 20, 1989

### Advancing a Client's Fine

*Opinion rules that a lawyer may advance his client's fine.*

#### Inquiry:

Perry Mason devotes a substantial portion of his practice to the defense of the criminally accused. He is often retained at the last minute to represent individuals who are unable to come to court for waivable offenses. These individuals may reside out of state, be away on business, or just unable to miss a day of school or work. The local district attorney's office often offers favorable plea bargains only on the first court date, and either withdraws or offers a less favorable plea bargain if the case is continued. Consequently, counsel is compelled to waive the client's appearance, accept the favorable offer, and the consequently more favorable judgment.

May an attorney, under this fact situation, advance the fine and court costs on behalf of his client, as long as he expects to seek reimbursement from his client?

#### Opinion:

Yes. Rule 5.3(b) of the Rules of Professional Conduct, while generally prohibiting the lending of living expenses to a client, does permit a lawyer to advance court costs on the client's behalf from the lawyer's own funds while representing the client in connection with pending litigation so long as the client remains ultimately liable for the expense. Although the advancement of fines is not expressly permitted, there appears to be no principled distinction between such penalties and the other kinds of expenses which may be legitimately advanced such as court costs, expenses of investigation, expenses of medical examination, and the costs of obtaining and presenting evidence. Nor would the policies which underlie Rule 5.3(b) seem to warrant the prohibition of such a loan. The advancement of fines is unlikely to create a conflict of interest which would compromise the lawyer's professional judgment in a criminal case. It is also unlikely that a lawyer would suggest his willingness to advance a fine in order to solicit a criminal case.

## RPC 77

October 20, 1989

### Disclosure of Confidential Information to Liability Insurer

*Opinion rules that a lawyer may disclose confidential information to his or her liability insurer to defend against a claim but not for the sole purpose of assuring coverage.*

#### Inquiry:

Attorney B has represented Company X for many years in connection with various tax and legal matters. Company X later learned that for several years it has failed to file certain informational returns, which could subject it to signifi-

cant criminal and civil penalties. Attorney B, as Company X's lawyer, may in turn be liable for any penalties that Company X incurs arising out of its failure to file. Company X does not make any formal claim or demand against Attorney B, however, and does not retain separate counsel to represent its interests against Attorney B.

Attorney B is insured by Insurance Company. The insurance policy with Attorney B provides, in relevant part:

#### *V. Notice of Claim or Suit*

*As a condition precedent to coverage afforded by this policy, upon any Insured becoming aware of any act or omission which could reasonably be expected to be the basis of a claim or suit covered hereby, written notice shall be given to the Company or any of its authorized agents as soon as practicable, together with the fullest information obtainable. If claim is made or suit is brought against any Insured, such Insured shall immediately forward to the Company every demand, notice, summons or other process received by that Insured*

*...*  
*The Insured shall cooperate with the Company and at the Company's request make available all records and documents and submit to examination(s) under oath by a representative of the Company.*

Attorney B notifies Insurance Company of Company X's potential claim, but fails to identify Company X specifically or provide information whereby Company X could be identified, on the grounds that such information would constitute disclosure of confidential information.

After receiving notification, Insurance Company retains Attorney C to assist Attorney B in remedying Company X's failure to file tax returns and to defend Attorney B against any claims by Company X. Attorney C asks Attorney B for more information about Company X, pursuant to the terms of the insurance policy.

1. May Attorney B disclose the identity of Company X and other relevant background information about Company X, such as the number of its employees and nature of its business to Insurance Company without obtaining Company X's consent?

2. May Attorney B disclose this information to Attorney C without obtaining Company X's consent?

3. If the answer to (1) is no and the answer to (2) is yes, may Attorney C then reveal the information to Insurance Company?

#### Opinion:

The identity of a client is not normally considered confidential information protected by Rule 4, whereas the fact that Company X has failed to file income tax returns normally would constitute confidential information. In this case, however, because Attorney B has already revealed the failure to file returns, but not the name of the company, disclosure of Company X's identity would effectively disclose Company X's secret for the first time.

Because Company X's identity is a confidence under these circumstances, it may not be revealed, unless one of the exceptions to the confidentiality rule set out in Rule 4(c) is present. Under Rule 4(c)(5), a lawyer may reveal confidences to the extent the lawyer reasonably believes necessary to establish a defense between the lawyer and a client.

While Company X has not yet filed a claim against Attorney B, the comment to Rule 4 indicates that a lawyer need not wait until an action is commenced before responding to a claim or accusation. On the other hand, the comment also makes it clear that any disclosure should be closely tailored to the attorney's need to defend him or herself. It is the opinion of the Ethics Committee that Attorney B may reveal information about Company X to Attorney C who will represent B in the event of a claim by Company X, but that Attorney B should only reveal that which is absolutely required under the policy. B is Attorney C's client to whom he owes primary responsibility. Accordingly C may not reveal information received from B to the insurance company without B's consent.

There is no exception to the lawyer's obligation to preserve client confidences for the purpose of assuring Lawyer B's coverage under his professional liability policy.

The question of what exact information must be revealed and whether it should be revealed to Attorney C or to Insurance Company directly to comply with Insurance Company's policy is a question of law beyond the authority of the Ethics Committee.

## RPC 78

October 20, 1989

### Conditional Delivery of Trust Account Checks

*Opinion rules that a closing attorney cannot make conditional delivery of trust account checks to real estate agent before depositing loan proceeds against which checks were to be drawn.*

#### Inquiry:

Attorney closes loans for a number of real estate clients. After all documents are signed, but before recording, Attorney gives the real estate agent the commission check and the check for the Sellers' proceeds, with specific instructions that real estate agent is to hold both checks in trust until notified that the closing documents have been recorded and all closing proceeds have been deposited in Attorney's trust account. Attorney then records the necessary documents and deposits all closing proceeds in his trust account.

Attorney has been given closing instructions from the lender which require recording before disbursement. Attorney has actually signed a statement to the lender that he will follow the lender's instructions. Attorney is on the approved attorneys' list for a number of title insur-

ance companies who have issued insured closing letters to lenders whose loans Attorney closes. The insured closing letter ensures that Attorney will comply with the lender's closing instructions. Attorney does not deposit any funds, including lender's loan proceeds, until after title update and recording. If a defect in title is discovered by Attorney in his title update after "disbursement," he will not record and will notify the real estate agent to return the checks.

1. May Attorney ethically tender to real estate agent, in trust, the commission and seller's proceeds checks with instructions that the realtor, as agent for attorney, hold such checks until the attorney has recorded the closing documents, deposited the closing proceeds in his trust account, and notified the realtor that he may disburse the checks which real estate agent is holding in trust?

2. Has Attorney violated any ethical requirements in disregarding the potential liability that would be imposed upon the title insurance company and/or his professional liability carrier if a defect is discovered after disbursement?

#### Opinion:

This is a variation of the inquiry addressed in RPC 44, concerning the obligation of the closing attorney to follow the instructions of his client, the lender, to record documents before disbursing loan proceeds.

1. No. The attorney may not ethically deliver trust account checks to the real estate agent, even if such delivery is made "in trust" or "conditionally," until the attorney has recorded the closing documents and deposited the closing proceeds in his trust account.

Arguably, the conditional delivery of the trust account checks would not violate the lender's instructions, because the Attorney is, in fact, recording before depositing and disbursing the lender's funds. Those funds have not been "disbursed." See RPC 44.

However, by delivering to the real estate agent checks drawn on the trust account when the account has either (i) no funds or (ii) trust funds belonging to others, the Attorney violates Rules 10.1 and 10.2. Under those rules, funds deposited in a trust account are funds received by the Attorney as a fiduciary, which must be held and disbursed only for the benefit of those entitled to them, in accordance with appropriate instructions. Accordingly, Attorney cannot violate or delegate his fiduciary duty by putting into the hands of an unrelated third-party a check, regular on its face, drawn on a trust account containing only the funds of others. Similarly, Attorney cannot ethically deliver checks drawn on an account with insufficient funds, in violation of the law and the implicit requirement imposed by Rule 10.2(F).

2. Because of the answer to question 1, it appears unnecessary to answer question 2. Reference is made to the RPC 44. As a general matter, the ultimate liability created under a title insurance policy or professional liability insur-

ance policy will be irrelevant to a determination of the ethical issues, which must be judged independently of legal liability and insurability.

## RPC 79

January 12, 1990

### Surrender of Medical Records

*Opinion rules that a lawyer who advances the cost of obtaining medical records before deciding whether to accept a case may not condition the release of the records to the client upon reimbursement of the cost.*

#### Inquiry:

Firm X does a substantial amount of plaintiff's medical malpractice litigation. When a client comes to Firm X initially, it accepts the case only for review, until it determines whether there is sufficient evidence of negligence, causation and damages to justify bringing an action.

In the process of reviewing these cases, Firm X collects and reviews medical records concerning relevant treatment. In many cases, these medical records are extensive and consist of thousands of pages. Hospitals and physicians who provide these records charge for the cost of copying them. When a person has been hospitalized for an extensive period of time, the cost of obtaining the complete medical records, which may be needed for thorough review, can be hundreds and even thousands of dollars.

In many cases, in accordance with Rule 5.3 of the Rules of Professional Conduct, Firm X has advanced on behalf of the client the cost of obtaining the medical records, while always communicating to the client that he or she remains ultimately liable for this cost.

Firm X declines many of the cases because of a lack of evidence of liability. When Firm X declines a case and has advanced substantial funds on behalf of the client to obtain medical records or to obtain review of these records by physicians or other health care providers, what does Rule 2.8 require in terms of turning over to the client those medical records for which funds have been advanced? If Firm X informs the client that it will provide the medical records when the client reimburses it for the amount advanced, is it in violation of Rule 2.8? The client may, of course, obtain these records personally simply by requesting them from the treating physician or institution and paying the cost.

#### Opinion:

Law Firm X must turn over unconditionally to its client any material such as copies of medical reports or statements of expert opinion which were obtained on the client's behalf and account if such would be useful to the client in further prosecution of her claim. Rule 2.8(a)(2) of the Rules of Professional Conduct requires that a lawyer who withdraws from employment take reasonable steps to avoid foreseeable prejudice to rights of the client. One means of avoiding such prejudice is, in the language of the rule, "delivering to the client all papers and

property to which the client is entitled." Although the rule itself does not define the extent of the client's entitlement, the comment to the rule does indicate that, "anything in the file which would be helpful to successor counsel should be turned over." There follows in the comment a nonexclusive listing of such items. While the comment does not specifically identify information gathered by a law firm incident to its determination whether it will accept a case as material which must be surrendered, there appears to be no logical reason to except such material from the obligation imposed by the rule. Regardless of the decision ultimately made by Firm X as to whether it wishes to prosecute the client's case to its conclusion, it is obvious that an attorney/client relationship exists during the period the case is being evaluated. That being the case, Rule 2.8 concerning withdrawal from representation would govern an attorney's actions in the wake of a decision not to undertake further prosecution of the client's case. If material obtained during the evaluation process on the client's account would be of some value to the client in pursuing her claim, it must, under the terms of the rule, be surrendered unconditionally without regard to whether the cost of its acquisition was advanced by the law firm or the client.

## RPC 80

January 12, 1990

### Lending Money to a Client

*Opinion rules that a lawyer may not lend money to a client who is represented in pending or contemplated litigation except to finance costs of litigation.*

#### Inquiry:

Under what circumstances, if any, may a lawyer lend money to a client for whom the lawyer is handling a personal injury claim?

#### Opinion:

Rule 5.3(b) of the Rules of Professional Conduct generally prohibits lawyers advancing or guaranteeing financial assistance to a client while representing the client in connection with contemplated or pending litigation. There is one narrow exception to the rule which permits a lawyer to "advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses."

## RPC 81

January 12, 1990

### Interviewing the Former Employee of an Adverse Corporate Party

*Opinion rules that a lawyer may interview an unrepresented former employee of an adverse corporate party without the permission of the corporation's lawyer.*

#### Inquiry:

May a lawyer interview an unrepresented former employee of an adverse corporate party without the permission of the corporation's lawyer?

#### Opinion:

Yes. Rule 7.4(a) prohibits contact only with the party itself. Where the party in question is corporate, the protection of the rules also extends to persons who have the legal power to bind the corporation or who are responsible for implementing the advice of the corporation's lawyer. This is necessary to prevent inadvertent settlements and similarly major capitulations of legal position on the part of a momentarily unrepresented, but represented, party and to enable the corporation's lawyer to maintain an effective lawyer-client relationship with members of management. The rule is not meant to protect a corporation whose interests might be impaired by factual information willingly shared by a former employee. A former employee is in no sense the alter ego of the corporation and may be interviewed by any interested party regarding relevant matters.

## RPC 82

January 12, 1990

### The Lawyer as Trustee

*The State Bar has received an increasing number of inquiries related to the role of an attorney serving as trustee under a deed of trust. In an effort to clarify the responsibilities of the lawyer-trustee, the Ethics Committee has reviewed CPRs 94, 107, 166, 201, 218, 220, 297, 303, 305 and RPCs 46 and 3.*

*The responsibilities and limitations of the lawyer acting as trustee arise primarily from the lawyer's fiduciary relationship in serving as trustee as opposed to any attorney-client relationship. That fiduciary relationship demands that the trustee be impartial to both the trustor and the beneficiary and, therefore, the trustee may not act as advocate for either against the other. On the other hand, once the fiduciary duties of the trustee terminate, the lawyer may take a position adverse to the trustor or beneficiary so long as the lawyer is not otherwise disqualified.*

#### Inquiry #1:

Attorney X is appointed as substitute trustee on a deed of trust. The grantor/borrower defaults and the bank proceeds to foreclose. At the foreclosure sale, the subject tract of land sells for less than the amount owed. The bank wants to sue for the deficiency. Can Attorney X serve as the attorney for the bank in the deficiency proceeding against the grantor/borrower? Can Attorney X serve as attorney for the bank in an action for waste?

#### Opinion #1:

Yes. It has long been recognized that former service as a trustee does not disqualify a lawyer from assuming a partisan role in regard to fore-

closure under a deed of trust. CPR 220. It is therefore not inappropriate for the former trustee to act as an advocate for the lender in a subsequent suit to recover a deficiency or to recover damages for waste.

#### Inquiry #2:

If foreclosure proceedings have been instituted against a debtor who files for bankruptcy prior to completion of the foreclosure, may Attorney A, who serves as Substitute Trustee in the foreclosure, dismiss the foreclosure proceeding and subsequently file a motion in the Bankruptcy Court to set aside the automatic stay?

#### Opinion #2:

No. See CPR 94. So long as the attorney serves as trustee, he may not represent one party against the other in an adversarial proceeding arising from or connected with the deed of trust.

#### Inquiry #3:

Corporation X serves as Substitute Trustee in a foreclosure proceeding. Attorney A owns stock in Corporation X. If foreclosure proceedings have been instituted against a debtor who files for bankruptcy prior to completion of the foreclosure, may Attorney A file a motion in Bankruptcy Court to set aside the automatic stay on behalf of Corporation X?

#### Opinion #3:

Yes, unless Corporation X is controlled by or is the alter ego of Attorney A.

#### Inquiry #4:

Attorney A serves regularly as Agent as that term is used in Chapter 45 of the North Carolina General Statutes for Attorney B who serves as substitute trustee. Attorney A is basically a paper handler for Attorney B. Attorney A's responsibilities are to determine that service has been achieved before the hearing, to verify the filing of an order after hearing, to post sale notices and to conduct the sale on behalf of the substitute trustee. Attorney A also determines whether any upset bids are filed and files the final report of sale. Attorney A prepares no paperwork, does not deal with any lender and makes no decisions as to the adequacy of service or other matters.

Under these circumstances may Attorney A bid for herself at a foreclosure sale or may someone from her law firm or a family member of Attorney A bid on their own behalf? Secondly, in the event of a bankruptcy filing, may Attorney A move the bankruptcy court to lift the automatic stay and participate as an advocate for the lender in the bankruptcy matter.

#### Opinion #4:

Attorney A, acting as agent for the substitute trustee, is subject to the same restrictions as the substitute trustee. Therefore, Attorney A may not bid at the foreclosure sale on Attorney A's own behalf and a member of Attorney A's law firm would similarly be restricted from bidding. A family member of A would not necessarily be prohibited from bidding at the foreclosure sale

on his or her own behalf but could not bid on behalf of A.

Attorney A also could not file a motion to lift the automatic stay in the bankruptcy proceeding so long as Attorney A continued to act as agent for the substitute trustee and, similarly, Attorney A could not act as advocate for a lender in the bankruptcy proceeding.

#### **Inquiry #5:**

Attorney A, acting as trustee, has instituted a foreclosure action. Attorney A knows the property being foreclosed is worth more than the highest bid received at the foreclosure sale.

May Attorney A call a friend to upset the bid causing a resale?

#### **Opinion #5:**

If Attorney A, by calling his friend, is acting on his own behalf in filing an upset bid, the conduct inquired of is not permitted. If, on the other hand, Attorney A is simply notifying a potential buyer of the situation, then such conduct is not prohibited.

#### **Inquiry #6:**

"A" borrowed funds from Federal Land Bank, secured by a deed of trust. "A" subsequently borrows funds from lender secured by a second deed of trust. The lender substitutes a trustee and institutes foreclosure. Prior to completion of foreclosure "N" purchases the note and deed of trust. "N" contends this was done at request of "A." "A" does not pay and "N" substitutes "T" (attorney) as Trustee. "T", the substitute trustee (attorney), at the request of "N" writes a demand letter.

"T" did not represent "N" or "A" when the note was purchased, and did not represent either party in the original loan.

The deed of trust provides for Trustee's fees. The note provides for up to fifteen (15%) percent attorney's fees.

"A" responds by letter that "N" owed him money; that this purchase was to offset the debt due by "N" to "A", and made threats to expose "N" as a drug dealer, among other charges. "T" prepares notice of hearing, after title search, and serves 60 day notice on "A" and U. S. Attorney and Attorney General.

1. May "T" proceed with notice of hearing and Trustee's sale?

2. Must "T" advise "N" to seek counsel at this time?

3. May "T" wait until the foreclosure hearing to ascertain whether a legal dispute arises?

4. If a third substitute trustee must be named, can that person be a spouse or family member of "N"; a spouse or family member of "T"; an employee of either?

5. Can "T" elect to serve as either trustee or attorney?

6. Does "T" represent "N" before the Clerk in seeking foreclosure?

7. Could "T" represent "N" on appeal, if he has not responded?

8. Does "T" represent "N" when the Notice of Hearing is filed or a hearing held?

9. May "T" charge a fee for legal services under note authorizing fees?

10. May "T" charge Trustee's fees if settlement is reached?

11. May both be charged?

#### **Opinion #6:**

1. Yes. "T's" duties as trustee obligate him to prepare and serve a Notice of Hearing upon request of the beneficiary and to hold a sale if authorized by the Clerk of Court after hearing. "T" may not, however, assume an adversarial role to trustor or beneficiary if there is a dispute concerning the foreclosure.

2. Under the facts stated, "T" should notify "N" that it appears that the foreclosure will be contested by "A" and, if so, "T" will not be able to represent "N" as attorney.

3. Yes.

4. Whether a third substitute trustee could be a spouse or a family member of "N" or an employee of "N" raises no question concerning legal ethics and therefore is not an appropriate subject for consideration by the Ethics Committee of the North Carolina State Bar. A spouse or family member or employee of "T" could serve as a third substitute trustee but, under such circumstance "T" could not serve as attorney for "N" or "A."

5. Yes.

6. If the foreclosure is disputed "T" would be deemed to represent "N" in seeking foreclosure before the Clerk of Court and therefore could not serve as trustee and attorney for "N".

7. No. So long as "T" continues as trustee, he may not take an adversarial position against either "N" or "A" in any matter arising from the foreclosure.

8. "T" does not represent "N" as an attorney. when the notice of hearing is filed as the filing of that notice is a responsibility of "T" as trustee. At a foreclosure hearing, in the event the foreclosure is disputed, "T", serving as trustee, may not participate in requesting the Clerk to authorize foreclosure.

9. No. So long as "T" serves as trustee, he may not act as attorney for either of the parties to the deed of trust and therefore may not charge either party fees for legal services.

10. The question of whether "T" may charge trustee fees if settlement is reached is a question of law and does not appear to involve legal ethics. This committee is not the appropriate forum for determining questions of law.

11. See opinion 10 above.

## **RPC 83**

January 12, 1990

### **Rendering a Title Opinion Upon Property In Which the Lawyer Has a Beneficial Interest**

*Opinion rules that the significance of an attorney's personal interest in property determines whether he or she has a conflict of interest sufficient to disqualify him or her from rendering a title opinion concerning that property.*

#### **Inquiry:**

Attorney A is a member of Law Firm ABC.

Attorney A's wife, who is not an attorney, wishes to purchase 2.5 percent of the common stock of Corporation Z. Corporation Z is the general partner of a North Carolina limited partner which is engaged in development and sales of residential real estate.

CPR 254 provides that no member of a law firm may render a title opinion in a sales transaction if a member of the law firm has a beneficial interest in the selling entity.

If Attorney A's wife acquires stock in Corporation Z, will Attorney A be deemed to have acquired a "beneficial interest" in Corporation Z within the meaning of CPR 254, such that no member of Attorney A's firm may render title opinions in transactions in which Corporation Z's limited partner is the seller?

#### **Opinion:**

CPR 254 held that an attorney who owns a "beneficial interest" in an entity which was selling property could not certify title to the property sold. The opinion extended the disqualification to the attorney's partners and associates as well. The opinion went on to hold, however, that ownership of shares of a publicly held corporation did not constitute a beneficial interest for purposes of the disqualification rule.

CPR 254 was based on Disciplinary Rule 5-101(a) of the Code of Professional Responsibility. The Code has since been supplanted by the Rules of Professional Conduct. Rule 5.1(b) now governs. Rule 5.1(b) disqualifies a lawyer from acting in the face of a personal conflict of interest when his or her representation might be materially limited, unless 1) the attorney reasonably believes the representation will not be adversely affected and 2) the client consents after full disclosure.

Although CPR 254 appears to disqualify a lawyer with any beneficial interest in the selling entity, the exception for stockholders of publicly held corporations implies that disqualification is really a function of the significance to the attorney of his or her personal interest and the affect of the transaction on that interest. If the attorney or a close relative would realize considerable personal gain from the transaction, it is likely that his judgment would, in the words of Rule 5.1(b), be materially limited. Under such circumstances, a reasonable lawyer probably would be unable to conclude that the conflict could be successfully managed and would be disqualified, regardless of whether the entity requesting the title opinion would consent. By the same token, the judgment of a lawyer whose personal interest is insignificant would probably not be materially limited. In such a case, the lawyer could reasonably believe that the conflict would not adversely affect the representation and could proceed if the client (the entity to whom the opinion is being rendered) consents.

In the facts stated, it appears that Attorney A's wife owns only a small portion of the outstanding stock of Corporation Z, although the dollar value of the stock is not stated. Moreover, it appears that Corporation Z is a partner of the selling entity, but is not itself the owner of the entity selling the land. This being the case, it appears that there is little likelihood that the investment of Attorney A's wife would sway the judgment of Attorney A. Consequently, Attorney A could reasonably believe that his representation of the selling partner would not be adversely affected by his wife's interests. If in addition, he or she actually believes that to be the case and the client consents after full disclosure, there would need be no disqualification of the lawyer or other members of the lawyer's firm. To the extent that it differs from this opinion, CPR 254 is superseded.

## RPC 84

January 12, 1990

### Settlements and Reports of Lawyer Misconduct

*Opinion rules that an attorney may not condition settlement of a civil dispute on an agreement not to report lawyer misconduct.*

#### Inquiry:

A has brought a civil malpractice action against her former attorney, B. B hopes to settle the matter out of court. May B ask A, who is represented by C, to refrain from filing a grievance against B with the North Carolina State Bar as a provision of the settlement of the underlying civil malpractice action?

#### Opinion:

No. In order for the North Carolina State Bar to fulfill its responsibility to regulate the legal profession, it is imperative that persons who are aggrieved by apparent lawyer misconduct or who have otherwise become aware of such misconduct feel free to transmit relevant information to the Grievance Committee for investigation. A lawyer who attempts to dissuade a person from reporting his or her alleged misconduct in the course of settlement negotiations or in any other context would be engaging in conduct prejudicial to the administration of justice in violation of Rule 1.2(d) of the Rules of Professional Conduct.

#### Inquiry:

May C in the context of such a settlement also agree not to report B?

#### Opinion:

No. Even though such an agreement might appear to be in the client's best interest, C cannot participate as an accommodation to B. Rule 1.2(a) provides that it is misconduct for a lawyer to assist another lawyer to violate the Rules of Professional Conduct. As was mentioned above, B may not ethically condition settlement upon an agreement that his misconduct not be reported.

#### Inquiry:

If A has already filed a grievance with the North Carolina State Bar before the civil malpractice action is settled, may attorney B request that the grievance be withdrawn as a part of the settlement of the malpractice action? Would the answer be different if A was not represented by independent counsel in the malpractice action?

#### Opinion:

Although a grievance cannot be withdrawn by the complainant, an accused lawyer would be engaging in conduct prejudicial to the administration of justice in violation of Rule 1.2(d) if he or she should, under any circumstances, attempt to persuade a complainant or a material witness not to cooperate with an investigation of alleged misconduct.

## RPC 85

January 17, 1991

[Editor's Note: This opinion was originally published as RPC 85 (Revised).]

### Of Counsel Relationships Between Lawyers in Different Towns

*Opinion rules that an "of counsel" relationship may exist between lawyers practicing in different towns if the professional relationship is close, regular and personal and the designation is not otherwise false or misleading.*

#### Inquiry:

May an attorney with an office in one town in North Carolina properly serve as "of counsel" to a law firm in another town while maintaining his own practice?

If so, would the answer be different if both towns were in the same county?

#### Opinion:

An attorney may be designated "of counsel" to a North Carolina law firm when the relationship between the two is a close, regular and personal relationship for the practice of law and this designation is not otherwise false or misleading.

Over the years there has been a proliferation of variants of the term "of counsel," generally where there is a holding out to the world at large about some general and continuous relationship between the lawyers and law firms in question. In RPC 34, it was recognized that the term could be properly applied to a relationship characterized as a "close, in-house association," suggesting, perhaps, that lawyers and firms in different towns should not use the term "of counsel" to describe their relationship. However, the appropriateness of the "of counsel" designation does not turn solely upon the location of the parties' offices, nor does it turn solely on the amount of time spent in those offices. Rather, the "of counsel" designation (or one of its variants) is appropriate when there is a close, regular and personal relationship between the lawyer and the law firm. Thus, relationships that involve only one case or matter, that involve only

occasional collaborative efforts among otherwise unrelated lawyers or firms, or that primarily involve only the forwarding of legal business would not satisfy the requirements for the use of the "of counsel" appellation. The critical consideration is the nature of the relationship and the adherence to the rules applicable to conflicts of interest and confidential information. In no event may "of counsel" be used unless the usage is consistent with the rules pertaining to false and misleading communications (Rule 2.1) or firm names and letterheads (Rule 2.3). Any pertinent jurisdictional limitations on the lawyer's entitlement to practice must also be indicated.

## RPC 86

April 13, 1990

### Disbursements Incident to Real Property Closings

*Opinion discusses disbursement against uncollected funds, accounting for earnest money paid outside closing and representation of the seller.*

#### Inquiry #1:

Must the closing attorney collect earnest money held in the trust accounts of real estate agents or other attorneys in the form of certified funds?

#### Opinion #1:

No. While it is certainly the better practice for the closing attorney to issue trust account checks only against collected funds, CPR 358 recognized that under certain circumstances such checks may be drawn against funds which though uncollected have been provisionally credited to the attorney's trust account by the financial institution in which the trust account is maintained. A closing attorney should disburse against provisionally credited funds only when he or she reasonably believes that the underlying deposited instrument is virtually certain to be honored when presented for collection. In addition, an attorney should take care not to disburse against uncollected funds in situations where the attorney's assets or credit would be insufficient to fund the trust account checks in the event that a provisionally credited item is dishonored.

#### Inquiry #2:

Must the closing attorney request that all earnest money be entrusted to him or her prior to closing?

#### Opinion #2:

Again it would appear that the better practice, which would involve the closing attorney's receipt and disbursement of all funds involved in the transaction, is not absolutely compelled by the Rules of Professional Conduct. An attorney does have an absolute obligation under Rule 10.2(E) to follow his client's instructions relative to the money which is entrusted to him or her. If, as was the case in RPC 44, the lender conditions the disbursement of loan proceeds upon some clearly specified event, such as the deposit in the attorney's trust account of all earnest money, the attorney would be obliged to

honor that instruction and to insist upon the entrustment prior to proceeding further with the closing. If, however, the closing attorney receives no such instruction, it is conceivable that a closing could be accomplished in which some funds pertaining to the transaction are never received or disbursed by the closing attorney. In such situations the attorney should certainly take care to advise the client that he or she cannot guarantee the appropriate handling of all the money and in particular should identify for the client the risk that the party holding the earnest money might disburse prior to the attorney's updating the title and recording the deed and deed of trust.

#### **Inquiry #3:**

And in relation to the above, if the closing attorney does not require that all earnest money come in at closing, is he or she making potentially false certifications on the HUD Settlement Statement if it shows the earnest money as a credit against the payment of commissions or sales proceeds?

#### **Opinion #3:**

An attorney must, of course, be scrupulous in documenting his or her handling of trust funds (Rule 10.2(d)). If an attorney does not handle all funds incident to a real estate transaction which he or she is closing, it would certainly be prudent to carefully qualify any statements appearing on the settlement statement relative to the attorney's responsibility for the discharge of certain obligations and the quality of the attorney's knowledge relative to matters set forth only upon information and belief. As a practical matter, the attorney should obtain receipts from any persons or entities to whom payments have been made outside of closing if such are to be reflected upon the closing statement.

#### **Inquiry #4:**

Can the closing attorney retained by the buyer charge the seller a fee for doing the closing and handling certain matters for the seller that are not included in deed preparation? For example, after agreeing to handle a closing for Buyer A, the closing attorney pays off the seller's loan and must spend several hours retrieving the "paid and satisfied" note and deed of trust from seller's former bank in order to clear the title and have title insurance issued on behalf of Buyer A. Can the closing attorney charge a "closing fee?" If the answer to this question is yes, what kind of notification to or agreement with seller (and buyer) would be required?

#### **Opinion #4:**

In the typical residential transaction, it would not be inappropriate for the closing attorney who has been employed by the buyer to negotiate with the seller for the payment of a fee by the seller for legal services rendered on behalf of the seller incident to the closing. Any such contracts for legal services should be executed only where the provisions of Rule 5.1(a) can be satisfied relative to potential conflicts of interest

and must be negotiated well in advance of closing.

### **RPC 87**

April 13, 1990

#### **Interviewing Nonparty Witnesses**

*Opinion rules that a lawyer wishing to interview a witness who is not a party, but who is represented by counsel, must obtain the consent of the witness' lawyer.*

#### **Inquiry:**

Attorney A has filed suit against Z in a civil matter. Attorney A wishes to contact X, who is a nonparty, potential witness. X has informed Attorney A that she has an attorney representing her respecting the civil matter about which Attorney A has sued Z. X is willing to discuss the civil matter with Attorney A, however. Once Attorney A learns that X has an attorney, must A obtain permission of X's attorney before discussing the civil matter with X further?

The express language of Rule 7.4 appears to be limited only to parties in a matter. The last sentence of the comment to the Rule, however, states that it applies to "any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question." (emphasis added) Since this language is in the comment, rather than the Rule itself, does it represent only an aspirational standard, or is it obligatory?

#### **Opinion:**

Once Attorney A learns that X has an attorney, A must obtain the permission of X's attorney before discussing the civil matter with X. This is made clear by that portion of the comment to the Rule which is set forth in the inquiry. In this instance, as in most cases, the comment is intended to explain the Rule.

As a matter of policy, Rule 7.4(a) was designed to reduce the risk that an attorney/client relationship in regard to a particular matter might be subverted by the importunings of counsel representing other persons or entities whose interests in the same matter might be adverse. The attorney/client relationship enjoyed by a potential witness and his or her counsel is no less worthy of protection than that enjoyed by any named party and his or her lawyer.

### **RPC 88**

July 13, 1990

#### **Employment of a Secretary Who is Also a Real Estate Broker**

*Opinion rules that a lawyer may close a real estate transaction brokered by a real estate firm which employs the attorney's secretary as a part-time real estate broker.*

#### **Inquiry:**

May Attorney X close a real property transaction brokered by a real estate firm which em-

plays the attorney's secretary as a part-time real estate broker?

#### **Opinion:**

Yes. In the situation described in the inquiry, the lawyer would be obliged to consider whether the exercise of his independent, professional judgment on behalf of his clients, the lender and the broker, would be "materially impaired" by his desire to advance his secretary's interests or his desire to encourage future referrals. Rule 5.1(b). If upon analysis it appears that the attorney's judgment might be so compromised, perhaps because the secretary is a valued friend who stands to gain a valuable commission upon the completion of the transaction, the conflict of interest would be disqualifying unless the lawyer reasonably believed that his representation of his clients would not be adversely affected and both clients consented to the lawyer's participation after a full disclosure of all risks involved.

It would, of course, be extremely improper for an attorney in this situation to attempt to encourage referrals from the real estate firm by offering financial incentives to his secretary. Rule 2.2(c).

### **RPC 89**

January 17, 1991

[Editor's Note: This opinion was originally published as RPC 89 (Revised).]

#### **Escheat of Trust Funds**

*Opinion rules that trust funds must be held at least five years after the last occurrence of certain prescribed events before they may be deemed abandoned.*

#### **Inquiry:**

Where a lawyer receives money in trust from a client who subsequently disappears and cannot thereafter be located by the lawyer upon due inquiry, how long must the lawyer retain the deposited funds in his or her trust account before deeming the money abandoned and paying the money into the escheat fund pursuant to the provisions of Rule 10.2(H) of the Rules of Professional Conduct and GS 116 (b)-18?

#### **Opinion:**

Rule 10.2(H) requires that property held in trust for an owner whose identity is known but who cannot be located must be deemed abandoned and paid to the state treasurer in compliance with the requirements of Chapter 116(b) of the General Statutes if, during the five-year period immediately preceding, the fund's principal has not increased, the owner has not accepted payment of principal or income, the owner has not corresponded in writing and the owner has not otherwise indicated an interest in the account as evidenced by a memorandum or other record on file with the lawyer. If any of the four events enumerated above have occurred during the five-year period immediately preceding, no abandonment will be deemed to have occurred and the client's funds must con-

tinue in the lawyer's trust. By the same token, whenever any of the four enumerated events occurs, a new five-year period begins to run during which the lawyer is obligated to maintain the property in trust and after which the property must be deemed abandoned, if none of the four enumerated events has occurred in the meantime. See also, G.S. 116B-13.5 concerning voluntary early delivery of funds.

## RPC 90

October 17, 1990

### Trustee for a Deed of Trust

*Opinion rules that a lawyer who has as trustee initiated a foreclosure proceeding may resign as trustee after the foreclosure is contested and act as lender's counsel.*

#### Inquiry #1:

Can a trustee who has initiated a foreclosure proceeding resign after it has become contested and then act as the lender's counsel in the foreclosure?

#### Opinion #1:

Yes. It has long been recognized that former service as a trustee does not disqualify a lawyer from assuming a partisan role in regard to foreclosure under a deed of trust. CPR 220, RPC 82. This is true whether the attorney resigns as trustee prior to the initiation of foreclosure proceedings or after the initiation of such proceedings when it becomes apparent that the foreclosure will be contested.

#### Inquiry #2:

Where foreclosure is pending and the borrower files bankruptcy, can the trustee under the deed of trust resign as trustee and thereafter represent the lender in the bankruptcy proceeding and the foreclosure proceeding?

#### Opinion #2:

Yes. Just as a lawyer may resign as trustee and undertake the representation of the lender in a contested foreclosure proceeding so also may a lawyer resign as trustee and undertake the representation of the lender in seeking to have an automatic stay lifted in a related bankruptcy proceeding.

#### Inquiry #3:

Where the lender believes the borrower is in default but no foreclosure proceedings have been instituted, may an attorney serving as trustee in a deed of trust represent the lender in an amicable modification or loan workout agreement? Does such representation of the lender preclude the attorney from thereafter initiating foreclosure proceedings as trustee?

#### Opinion #3:

No, a lawyer serving as trustee may not simultaneously participate in the negotiation of a loan modification or workout agreement as attorney for the lender. RPC 82. An attorney serving as trustee may, however, draft and preside over the execution of documents evidencing a modification or workout agreement negotiated between the lender and borrower. Under such circum-

stances, the trustee would not be representing the interests of either and would be engaged in no partisan activity in conflict with the obligation to be impartial. It is possible that a lawyer who resigns as trustee to perform some partisan service for the lender, such as the negotiation of a modification agreement, may thereafter be re-appointed as trustee and initiate foreclosure proceedings.

## RPC 91

January 17, 1991

[Editor's Note: This opinion was originally published as RPC 91 (Revised).]

### Conflict Between Insured and Insurer

*Opinion rules that an attorney employed by the insurer to represent the insured and its own interests may not send the insurer a letter on behalf of the insured demanding settlement within the policy limits.*

#### Inquiry:

Attorney A is retained by an insurance company to defend Dr. B in a malpractice suit brought against Dr. B. The case is very serious with catastrophic injuries to a minor child. The doctor has \$2,000,000 of insurance coverage. Dr. B comes to Attorney A and tells him that he is very worried about the case and wants Attorney A to immediately send a demand letter to the insurance company to settle within policy limits. Dr. B tells Attorney A that he read an article in a professional publication that he should do this in the event the jury awards the Plaintiff a judgment in excess of his policy limits. Dr. B could then sue his insurer for bad faith refusal to settle within policy limits. How should Attorney A handle this situation?

#### Opinion:

Attorney A must not undertake to counsel with Dr. B relative to any bad faith claim and may not send a demand letter on his behalf to the insurance company; however, Attorney A is obligated to inform the insurance company of Dr. B's wishes in regard to the case. Rule 6(b)(1). Rule 7.1(a)(1). Whenever defense counsel is employed by an insurance company to defend an insured against a claim, he or she represents both the insurer and the insured. When the possibility of judgment in excess of the policy limits becomes apparent to defense counsel, he or she must promptly advise both clients of the existence and nature of the conflict. Rule 5.1(a). Where the insured has contractually surrendered control of the defense and authority to settle the claim to the insurer, counsel will generally be obliged to accept his or her instructions in these matters from the insurer. In order to fully protect the insured from exposure in excess of the policy limits, especially with regard to settlement, defense counsel obtained by the insurer should also advise the insured that he or she cannot fully represent those interests and that it would be appropriate

for the insured to consider employing independent counsel to provide such representation.

## RPC 92

January 17, 1991

[Editor's Note: This opinion was originally published as RPC 92 (Revised).]

### Representation of Insured and Insurer

*Opinion rules that an attorney representing both the insurer and the insured need not surrender to the insured copies of all correspondence concerning the case between herself and the insurer.*

#### Inquiry:

We have been retained by a title insurance company to defend title in connection with a quiet title action which has been commenced against a named insured of the title insurance company. The title insurance policy provides that the title insurance company "will defend your title in any court case that is based on a matter insured against." In addition to the claim seeking to quiet title, the plaintiff has asserted a claim against the insured, personally, seeking to recover punitive damages in connection with the transaction pursuant to which title to the disputed property was transferred to the insured. The title insurance company has advised the insured that the punitive claim involves a potential loss which is not covered by the title insurance policy and has invited the insured to secure independent counsel for the purpose of providing a defense with respect to this claim, and the insured has done so. The title insurance company now has received a settlement offer which is for a sum less than the insured value of the property in dispute. To avoid the potential punitive exposure, the insured, through independent counsel, has demanded that the title insurance company settle the dispute and has put the title insurance company on notice regarding a potential bad faith claim. The insured now has asked us in writing to provide the insured with copies of all correspondence which we have sent to the title insurance company regarding this matter. This correspondence contains our thoughts and impressions regarding the case in general and our assessments regarding the possible outcome of the litigation.

The issue which the insured's request presents is whether we have an obligation to the insured, as a client, to provide the requested information or whether we have an obligation to the title insurance company which is simply discharging its duty to defend title which is in dispute, as a client, not to provide information which the insured may subsequently attempt to use in a manner adverse to the insurance company.

#### Opinion:

While Rule 6(b)(1) obligates an attorney to keep the client reasonably informed about the status of the case and to comply with reasonable requests for information, there is nothing in the

rules that requires defense counsel to furnish to the insured correspondence directed to the insurer during defense counsel's active representation of the insured. The representation of insured and insurer is a dual one, but the attorney's primary allegiance is to the insured, whose best interest must be served at all times. The attorney should keep the insurance company informed as to the wishes of the insured concerning the defense of the case and settlement. The attorney should also keep the insured informed of his or her evaluation of the case as well as the assessment of the insurance company, with appropriate advice to the insured with regard to the employment of independent counsel whenever the attorney cannot fully represent his or her interest. Further, if the attorney reasonably believes that it is in the best interest of the insured to provide him or her with work product directed to the insurer, such information may be disclosed to the insured without violating any ethical duty to the insurer.

## RPC 93

July 13, 1990

### Interviewing Codefendants in Criminal Cases

*Opinion concerns several situations in which an attorney who represents a criminal defendant wishes to interview other individuals who are represented by attorneys who will not agree to permit the attorney to interview their clients. In the first inquiry, Attorney A wishes to interview criminal defendant B, who has been indicted in a separate indictment from Attorney A's client. In the second inquiry, Attorney A wishes to interview criminal defendant B, who has been named as a criminal coconspirator with A's client, but has not yet been joined as a codefendant for trial. In the third inquiry, Attorney A wishes to interview a coconspirator who was named in the same indictment with A's client.*

#### Inquiry #1:

Defendant Smith is charged in a one-count indictment with first degree rape. Pursuant to a plea agreement, Smith enters a plea of guilty to second degree rape. The agreement also calls for Smith to give truthful testimony if called upon to do so. The Government agrees to make known the extent of Smith's cooperation at time of sentencing. In the process of cooperating pursuant to the plea agreement, Smith gives information which tends to implicate Jones in the same offense of first degree rape. Smith has not been sentenced.

Jones is then charged in a separate indictment with first degree rape. Jones' lawyer telephones Smith's lawyer and asks permission to interview Smith. Smith's lawyer refuses. Jones' lawyer nevertheless sends his investigator to interview Smith. After being informed of the identity of the investigator and his employer, and for whom he is working (Jones), Smith consents to the interview. In the process of the in-

terview, Smith gives a statement which completely exonerates Jones on the rape charge by telling a story which conclusively indicates that the victim consented to intercourse.

Jones' lawyer takes the report of interview to the prosecutor and tells him that he may as well go ahead and dismiss the indictment against Jones. Prosecutor telephones Smith's lawyer, who tells him that he forbade the interview. Prosecutor then accuses Jones' lawyer of unethical conduct.

Has Jones' lawyer violated Rule 7.4?

#### Opinion #1:

Yes. Rule 7.4(a) provides that a lawyer shall not "communicate or cause another to communicate about the subject of the representation with a party the lawyers knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." The comment to the Rule indicates that the Rule "covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question." In this situation Smith, though not technically a party to the criminal case against Jones, is obviously represented by counsel concerning the matter of the alleged rape. Having been refused authority to interview Smith by Smith's lawyer, Jones' lawyer could not then ethically discuss the case with Smith.

#### Inquiry #2:

Smith, Jones, and Williams are indicted for conspiracy to traffic in marijuana. Pursuant to State practice, each is indicted in separate indictments. However, the conspiracy counts name Smith, Jones, and Williams as coconspirators. The State has not yet moved to join the indictments for trial. Each defendant retains counsel.

Williams' attorney asks the attorneys for Smith and Jones for permission to interview their clients. They refuse. Later, Williams' attorney learns that Smith and Jones wish to talk to him. Williams' attorney relays this information to the attorneys for Smith and Jones. They still refuse to permit the interviews.

Despite these objections, Williams' attorney and his investigator meet with Smith and Jones. They tell Smith and Jones that they are employed by Williams, that they are working for Williams' best interests in the case, that Smith and Jones do not have to talk, that they are free to call their lawyers if they wish before speaking to him, and that they are free to terminate the interview at any time. Smith and Jones consent to the interview.

Has Williams' attorney violated Rule 7.4 by conducting the interviews of the codefendants in light of refusal by counsel to permit same?

#### Opinion #2:

Yes, although technically Smith, Jones, and Williams have not yet been made parties to the same criminal cases, they are "parties" known to be represented by counsel in the same matter, a conspiracy to traffic in marijuana. As such,

they may not be interviewed concerning the case without their lawyer's consent.

#### Inquiry #3:

The facts are the same as stated in Opinion No. 2, except that Smith, Jones, and Williams are indicted in federal district court for conspiracy to traffic in marijuana. All are indicted in the same indictment.

Has Williams' attorney violated Rule 7.4 by conducting the interviews of the codefendants in light of refusal by counsel to permit same?

#### Opinion #3:

Yes. Under the facts stated, Smith, Jones, and Williams are all parties to the same action and are each represented by counsel. Williams' attorney may not interview Smith or Jones over the objection of their attorneys. The fact that Smith and Jones appear to be willing to discuss the matter with Williams' attorney does not change the answer. Rule 7.4(a).

## RPC 94

July 13, 1990

### Private Lawyer Referral Service

*Opinion rules that a private lawyer referral service must have more than one participating lawyer and that all participants must share in the cost of operating the referral service.*

#### Inquiry:

Lawyer A wishes to operate a private lawyer referral service. Although Lawyer A is presently the only attorney participating, Lawyer A believes that Lawyer B, who resides and practices in an adjoining county, will also choose to participate. Lawyer A indicates that Lawyer B would be expected to pay a prorated fee for expenses relating to advertising in his county of residence only. Lawyer A will pay all other expenses until other attorneys become participants. Lawyer A further indicates that any attorney who wants to do a newspaper advertisement particular to his or her county or area will be expected to bear those costs alone. Participating attorneys will be expected to share the cost of radio or television advertising in their geographical areas on a prorata basis.

#### Opinion:

Implicit in the concept of a private lawyer referral service is the participation of more than one attorney. Any advertising of such an enterprise having only one participant would be misleading and in violation of Rule 2.1. For that reason Attorney A may not commence operation of the lawyer referral service until at least one other attorney has agreed to participate.

In order to fully participate in a private lawyer referral service, an affiliated attorney must share not only the cost of advertising but also the cost of operating the referral service. For this reason as well, Lawyer A may not operate a lawyer referral service with an attorney who does not contribute to the cost of operating the referral service and therefore cannot be viewed as a full participant in the service.

## RPC 95

April 12, 1991

[Editor's Note: This opinion was originally published as RPC 95 (Revised).]

### Assistant D.A. Serving on the School Board

*Opinion rules that an assistant district attorney may prosecute cases while serving on the school board.*

#### Inquiry:

Attorney A is an assistant district attorney and a member of a county board of education.

Fines and forfeitures in criminal cases are payable to the county board of education. Attorney A is concerned about his dual roles as prosecutor and board member and the possible conflict that arises during the negotiation of pleas. Accepting pleas to lesser charges, or dismissing charges in exchange for pleas to other charges usually has an effect on the fine imposed; and arguing before the court for a specific bond or forfeiture of that bond in other situations also affects monies going to the school system.

May Attorney A prosecute cases while serving as a member of the school board?

#### Opinion:

Yes. Although the interest of the school board in realizing maximum revenue from fines and forfeitures might, as a theoretical matter, conflict with the interest of the State of North Carolina in the procurement of just results in criminal cases, as a practical matter any such conflict would be *de minimis* and would not materially limit Attorney A's representation of the state. Rule 5.1(b).

In making this determination, the committee notes that statistics show that funds realized from the collection of fines and forfeitures constitute only a minute portion of the total funding of public schools in North Carolina. The committee is also advertent to the fact that in many cases county appropriations for school administration are decreased as the collection of fines and forfeitures increases on a dollar-for-dollar basis so that there is no net benefit to the local school board from extraordinary collections of fines or forfeitures.

## RPC 96

October 17, 1990

### Out-of-State Trust Accounts

*Opinion rules that attorneys practicing in North Carolina who are affiliated with an interstate law firm may not permit trust funds belonging to their clients to be deposited in a trust account maintained outside North Carolina without written consent.*

#### Inquiry:

North Carolina lawyers are affiliated with an interstate law firm having its primary office in Washington, DC. All bills issue from the firm's central accounting office in Washington and clients are asked to remit payment directly to that office. Occasionally, clients overpay bills and

such overpayments are deposited in the firm's trust account in the District of Columbia where they are handled in accordance with rules and regulations governing the maintenance of attorney trust accounts in that jurisdiction. It is also likely that any fees which are paid in advance of work being done would also be deposited in the Washington trust account. Clients of the North Carolina lawyers whose funds are being deposited in the Washington trust account are not routinely asked to consent to the deposit of their funds in a trust account maintained outside the State of North Carolina.

May North Carolina lawyers permit funds received on behalf of their clients to be deposited in the out-of-state trust account without their clients' knowledge and consent?

#### Opinion:

No. Rules 10.1(b) and (c) of the Rules of Professional Conduct require that funds received by North Carolina lawyers be deposited in trust accounts maintained at banks in North Carolina, unless the client has otherwise directed in writing. Since the arrangement described in the inquiry contemplates the deposit of such funds in trust accounts maintained outside the state of North Carolina without consultation with and direction from the clients to whom such funds belong, no North Carolina lawyer could ethically participate.

## RPC 97

October 17, 1990

### Representation of Condominium Association Against a Unit Owner

*Opinion rules that counsel for a condominium association may represent the association against a unit owner.*

#### Inquiry:

May an attorney employed as counsel for a nonprofit condominium association ("association of unit owners" pursuant to G.S. 47A-3(1)) bring a lawsuit on behalf of the corporation against a person who is a member of the association by reason of his ownership interest in a condominium unit?

#### Opinion:

Yes. Rule 5.10 of the Rules of Professional Conduct and its associated comment provide that a lawyer who represents a corporation or similar entity, such as a condominium association, represents the entity itself and not its individual officers or constituents. A lawyer for a condominium association may, without conflict of interest, represent the association in maintaining a legal action against one of its members.

## RPC 98

October 17, 1990

### Solicitation, Prior Professional Relationships and Advertising

*Opinion construes the term "professional relationship" and explores the circumstances un-*

*der which solicitation of persons or organizations with whom a lawyer has had business and professional dealings is permissible. Targeted print advertising is also discussed.*

#### Inquiry #1:

Attorney A has joined law firm XYZ. Prior to joining XYZ, Attorney A was a member of law firm TUV. While employed at law firm TUV, Attorney A provided legal advice to Client E and had frequent, direct contact with various executives of Client E. Law firm TUV also represented Client F while Attorney A was a member of TUV, though Attorney A never dealt directly with Client F.

Does Attorney A have a "prior professional relationship" with Client E such that it is proper for Attorney A to contact executives of Client E in person for the purpose of soliciting professional employment?

#### Opinion #1:

Yes.

#### Inquiry #2:

Does Attorney A have a "prior professional relationship" with Client F such that it is proper for Attorney A to contact Client F for the purpose of soliciting professional employment?

#### Opinion #2:

No. For the purposes of Rule 2.4(a), the term "prior professional relationship" contemplates that the subject attorney actually was involved in a personal attorney-client relationship with the prospective client. The mere fact that the subject attorney might have belonged to a firm which included another lawyer or lawyers who may have had such a relationship would not exempt the subject attorney from the rule's prohibition against in-person solicitation.

#### Inquiry #3:

Attorney A has joined law firm XYZ. Prior to joining law firm XYZ, Attorney A was in-house corporate counsel for Corporation C. Does Attorney A have a "prior professional relationship" with Corporation C such that it is proper for Attorney A to contact in-house counsel or executives of Corporation C for the purpose of soliciting professional employment?

#### Opinion #3:

Yes, an attorney who has previously served as in-house counsel for a corporation may, on the basis of that prior professional relationship, properly contact the corporation's current in-house counsel or its executives for the purpose of soliciting professional employment.

#### Inquiry #4

Attorney B was formerly an attorney with law firm XYZ. Attorney B left his employment with law firm XYZ and is now in-house corporate counsel for Corporation C. Do attorneys practicing with law firm XYZ have a "prior professional relationship" with Attorney B, such that it is proper for an attorney with law firm XYZ to contact Attorney B for the purpose of soliciting professional employment?

**Opinion #4:**

No. As used in Rule 2.4(a), the term "prior professional relationship" has reference only to a lawyer's professional relationship with a particular client. That a lawyer might have at one time been professionally associated with a lawyer who has become in-house counsel for a prospective corporate client is irrelevant.

**Inquiry #5:**

Attorney A is a member of law firm XYZ. Attorney A is a member of the Board of Directors of Corporation C. Attorney A has served only as a director of Corporation C; neither Attorney A nor law firm XYZ has been retained to represent Corporation C. P, also is a member of the Board of Directors of Corporation C, is President of MN Bank.

Does Attorney A have a "prior professional relationship" with executives of Corporation C, such that it is proper for Attorney A to contact executives of Corporation C in person for the purpose of soliciting professional employment?

**Opinion #5:**

No. See the response to inquiry #4 above.

**Inquiry #6:**

Does Attorney A's association with P as directors of Corporation C constitute a "prior professional relationship," such that it is proper for Attorney A to contact P in person for the purpose of soliciting professional employment?

**Opinion #6:**

No. See the response to inquiry #4 above.

**Inquiry #7:**

Attorney A is a member of law firm XYZ. Prior to joining law firm XYZ, Attorney A was in-house counsel for Corporation C. Attorney A was actively involved in professional groups, through which Attorney A worked with other in-house corporate counsel on professional subjects of common interests. As a result of that involvement, Attorney A developed close relationships with other corporate counsel, including Attorney B, who is in-house corporate counsel for Corporation D.

Does Attorney A have a "prior professional relationship" with Attorney B, such that it is proper for Attorney A to contact Attorney B for the purpose of soliciting professional employment by Corporation D?

**Opinion #7:**

No. See the response to inquiry #4 above.

**Inquiry #8:**

Law Firm ABC has prepared a summary of changes in North Carolina corporation law. Law firm ABC anticipates that in order to comply with the changes in the law, corporations in North Carolina will need to take certain action that would normally involve the services of attorneys, but law firm ABC does not know what the specific legal needs of various corporations will be. The summary identifies law firm ABC, the location of its office(s) and some or all of its attorneys and states that specific members of the firm are available to provide legal services regarding the matters discussed in the brochure.

Law firm ABC has distributed this summary to its present clients and would like to distribute the summary to corporations that are not present clients. In addition, brokerage firm X, which is not a client of law firm ABC, but which has some of the same clients as law firm ABC, has requested copies of the summary for distribution to its clients. Law firm ABC also plans to hold a seminar to explain the new changes in the law. At the seminar an announcement will be made that members of law firm ABC are available to provide legal services regarding the matters discussed at the seminar, but there will be no request that attendees engage the firm's services. The firm views both the summary and the seminar as educational and general marketing services, not specific solicitations.

May law firm ABC distribute this summary to nonclient corporations without labeling the summary as an "advertisement?"

**Opinion #8:**

Yes. Rule 2.4(c) requires that a communication be labeled as a legal advertisement only when it is directed to a prospective client known to need legal services in a particular matter. For the purposes of the rule, the term "in a particular matter," has reference to discrete factual incidents directly involving the prospective client of which the communicating lawyer has acquired knowledge. The rule was not intended to apply to communications sent to clients who, because of their mere existence in a complex and ever-changing legal environment, may need legal advice and assistance in maintaining compliance with existing law.

**Inquiry #9:**

May law firm ABC, without labeling the summary as an "advertisement," give copies of the summary to Brokerage Firm X (as requested by Brokerage Firm X), knowing that Brokerage Firm X plans to distribute the summary to (a) clients and (b) prospective clients of Brokerage Firm X?

**Opinion #9:**

Yes assuming that such material is not given to prospective clients who are known by the lawyer or the brokerage firm to need legal services in a particular matter.

**Inquiry #10:**

May law firm ABC invite nonclient corporations to attend the seminar without labeling the invitation as an "advertisement?"

**Opinion #10:**

Yes.

**RPC 99**

April 12, 1991

[Editor's Note: This opinion was originally published as RPC 99 (Revised).]

**Title Insurance Tacking**

*Opinion rules that a lawyer may tack onto an existing title insurance policy.*

**Inquiry:**

In 1986, Lawyer A represented Mr. Jones in his purchase of a house and lot. A performed a full title search and obtained a title insurance policy for Jones and his lender with Title Insurance Company. In 1990, Jones contracts to sell the house and lot to Ms. Smith. Smith retains Lawyer B to represent her in the transaction. B obtains a copy of the policy Title Insurance Company issued on the property.

Lawyer B's title search for Smith consists of updating Lawyer A's search; B searches the title from 1986 to 1990. Title Insurance Company allows B to apply for title insurance based on the update, and holds A liable for any title defects during A's search period that result in a claim against Smith. A never represented Smith. A has no knowledge that A's work is serving as the basis for providing title insurance to Smith. Title company has never informed A that A's liability to title company extends beyond the time A's clients owned the property. Lawyer B has made no attempt to obtain A's permission to use A's base title.

May Lawyer B render a title opinion without having conducted a personal inspection of documents in the chain of title?

**Opinion:**

Yes. A lawyer may ethically render to a title insurance company a limited title opinion based upon a limited examination of the public records for the purpose of obtaining the issuance of a title insurance policy upon real property. The Rules of Professional Conduct do not require personal inspection of all documents in the chain of title so long as the lawyer rendering the opinion fully discloses to his or her client the precise nature of the service being rendered and the full extent thereof. The client should be advised that he or she should rely on the title insurance policy as to matters of title and not upon the attorney's examination of the public records. If the Title Insurance Company is willing to base its underwriting decision upon the fact that it or another title insurance company has previously issued a title insurance policy and Lawyer B's limited title opinion, that does not offend the Rules of Professional Conduct.

Since title insurers frequently omit exceptions in mortgagees' policies that would appear in owners' policies, tacking should be limited to tacking onto owners' policies.

**Inquiry:**

May Lawyer B tack onto Lawyer A's base title without first obtaining Lawyer A's permission?

**Opinion:**

Lawyer B may ethically apply for the issuance of a title insurance policy on the basis of her limited title opinion and the fact that a title insurance policy has previously been issued. In so doing, the Rules of Professional Conduct would not require Lawyer B to obtain Lawyer A's permission. It is a question of law as to whether or not Lawyer A's liability to the title

insurance company would continue after the issuance of the new policy. It is beyond the purview of the committee to make that determination. A possible solution to this problem might be for a lawyer to include in her opinion to the title insurer a disclaimer to the effect that the opinion is submitted only with respect to the current transaction and is not to be relied upon in any future transaction.

**Inquiry:**

Must Lawyer B disclose to his or her client that B has updated the title and not performed a full title search? Must the disclosure be in writing? Must the disclosure be made before the client agrees to engage Lawyer B?

**Opinion:**

The disclosures referred to in the first opinion should be made by Lawyer B to the client prior to accepting employment. Rule 6(b)(2). The disclosures need not be in writing.

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## RPC 100

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January 18, 1991

### Lawyer Serving on Hospital Ethics Committee

*Opinion rules that an attorney serving on a hospital ethics committee is not automatically disqualified from representing interests adverse to the hospital or its staff physicians.*

**Inquiry:**

Attorney A is a member of an advisory ethics committee for a local hospital. The ethics committee functions in an advisory capacity rather than in a decision-making capacity. The functions of the ethics committee can include consultation, education and advice on policy. The committee is not involved in any disciplinary decision-making. Attorney A does not represent the ethics committee as an attorney but merely serves as a member of the committee who happens to be an attorney. Under the circumstances, may Attorney A file a civil action against a doctor who is on the staff of the hospital or the hospital itself? The civil action would not involve facts arising out of any situation which the ethics committee has reviewed or considered. Would the answer be different if the committee was a regular staff committee of the hospital as opposed to an administrative advisory committee?

**Opinion:**

Attorney A would not be automatically disqualified from representing an interest adverse to that of the hospital or one of its staff doctors by virtue of her service as a member of the hospital's advisory ethics committee. While Attorney A's personal relationship to the hospital could, under some circumstances, materially limit Attorney A's capacity to represent a party in litigation adverse to the hospital, it seems possible under these facts that Attorney A could represent the third party after forming the reasonable belief that her representation of the client would not be adversely affected. The

attorney should seek and obtain the consent of the client to the representation upon full disclosure of her relationship with the hospital. Rule 5.1(b)(1)(2). The attorney should also consider the appearance of impropriety that might be raised by representing a client against the hospital. Canon IX.

The answer would be the same if Attorney A served upon a regular administrative committee of the hospital. There would be no automatic disqualification, and resolution of the question would turn upon whether the lawyer might reasonably believe that her representation of the client would not be adversely affected and whether the client wished to consent upon full disclosure.

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## RPC 101

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April 12, 1991

[Editor's Note: This opinion was originally published as RPC 101 (Revised).]

### Borrower's Lawyer Rendering Opinion to Lender

*Opinion rules that the borrower's lawyer may render a legal opinion to the lender.*

**Inquiry:**

Lawyer A represents a borrower in negotiating a loan from a bank. The bank has a policy of requiring that counsel for its borrower render to it (the bank) a legal opinion that the loan in question and the terms of the loan do not violate any laws including, without limitation, any usury laws or similar laws relating to the charging of interest.

May Lawyer A ethically render such an opinion to the bank?

**Opinion:**

Yes, Lawyer A may ethically render an opinion to the bank. While it appears that the interest of the bank in closing the loan only when it can be assured that the transaction does not in any way offend technical banking regulations might possibly conflict with the borrower's desire to close regardless of any such technicalities, such conflict would not necessarily be disqualifying. In a commercial transaction of this sort where parties are dealing at arms length, a lawyer could reasonably conclude that her representation of neither interest would be adversely affected and, having drawn that conclusion, could proceed after fully disclosing the risks to the bank and to the borrower and obtaining the consent of both. Rule 5.1(a).

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## RPC 102

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January 18, 1991

### Gifts to Employees from Court Reporting Service

*Opinion rules that a lawyer may not permit the employment of court reporting services to be influenced by the possibility that the lawyer's employees might receive premiums, prizes or other personal benefits.*

**Inquiry:**

A local court reporting service is offering prizes to legal secretaries who place depositions with that service. The legal secretary with the most dollars billed to his or her firm within a certain period of time wins. May a lawyer permit the employment of court reporting services to be influenced by the possibility that the lawyer's employees might receive premiums, prizes or other personal benefits?

**Opinion:**

Court reporting services can vary in terms of cost, efficiency and quality. Such factors should be considered by the lawyer and his employees in purchasing such services for the client. It is evident that the judgment of the person selecting the court reporting service could be compromised by the prospect of earning prizes or premiums. This could be detrimental to the client. Rule 3.3(b) requires a lawyer having direct supervisory authority over a nonlawyer to make a reasonable effort to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer. This provision would certainly require the supervising attorney to direct his employee to avoid conflict of interest of this sort. Indeed, a lawyer who became aware of such a practice involving his secretary and took no action to have the practice discontinued would be professionally responsible for the conflict of interest under Rule 3.3(c).

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## RPC 103

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January 18, 1991

### Representation of Insured and Insurer

*Opinion rules that a lawyer for the insured and the insurer may not enter voluntary dismissal of the insured's counterclaim without the insured's consent.*

**Inquiry:**

Attorney A is retained by an insurance carrier to defend the named insured on a claim arising out of an automobile accident. The insurance carrier, the defendant or both wish to file a counterclaim on behalf of the defendant because liability is questionable on both sides. Attorney A explains to the defendant that a conflict of interest could arise if Attorney A represents the defendant on his counterclaim and the defendant signs an agreement authorizing Attorney A to file a voluntary dismissal with prejudice of the counterclaim in the event the insurance carrier decides to settle the plaintiff's claim before or during trial. Just before or during trial the insurance carrier and Attorney A decide to settle and the defendant changes his mind and wishes to proceed on his counterclaim, withdrawing his consent to have his counterclaim dismissed with prejudice. The plaintiff will not settle unless the defendant dismisses his counterclaim with prejudice.

Can Attorney A proceed to voluntarily dismiss the defendant's counterclaim with preju-

dice or should he seek to withdraw as counsel, based upon the conflict of interest? If the court refuses to allow Attorney A to withdraw just before or during trial, how should Attorney A proceed?

#### Opinion:

Attorney A may not dismiss the defendant's counterclaim with prejudice if authority to do so has been revoked. Rules 7.1(a)(1),(2) and (3) and 7.1 (c)(1). Attorney A should seek to withdraw from the representation of both the insured and insurer under the circumstances because of the conflict of interest engendered by his clients' competing desires in regard to the counterclaim. Rule 5.1(b). If the court refuses to grant permission to withdraw, Attorney A would be obligated to zealously defend the case on behalf of the insured and the insurer and to zealously prosecute the insured's counterclaim. Rule 7.1(a)(1) and (2).

### RPC 104

October 18, 1991

[Editor's Note: This opinion was originally published as RPC 104 (Revised).]

#### Leasing Associates

*Opinion rules that associate attorneys may be leased back to their firms.*

#### Inquiry:

Law Firm X desires to enter into an agreement with an employee leasing company for the lease of its associate attorneys. The employee leasing company, which is owned and managed by non-lawyers, would pay the leased attorneys' salaries from its payroll and would pay all employment and withholding taxes. In addition, fringe benefits, such as insurance and retirement benefits would be provided to the associates by the leasing company. Law Firm X would pay to the leasing company a fee calculated to cover the associates' wages, taxes and benefit costs and to provide a profit to the employee leasing company. The employee leasing company would have no control over the performance or duties of the leased associates. The leasing company would not have access to client files. All provisions pertaining to conflicts of interest would apply. The associate attorneys would be supervised and managed by partners of Law Firm X in the same manner as if the associates were not leased. Is such an arrangement ethical?

#### Opinion:

Yes, the subject arrangement is a "lease back" of the law firm's own employees having the practical effect of transferring only payroll administration and fringe benefit responsibilities to the leasing company. It is an accounting procedure provided by the employee leasing company to relieve the law firm and its partners from the bookkeeping duties arising out of the compensation of the law firm's own associates. For a fee the leasing company would handle payroll, withholding taxes, social security, health benefits and other financial personnel matters.

In some instances the arrangement would provide the law firm's associates increased benefits not available to them without the leasing company. As stated in the inquiry, the employee leasing company would have no control over the leased associates. The attorney employees would remain associates of the law firm. Control over the associates would remain within Law Firm X.

The arrangement proposed by Law Firm X for leasing its associates does not constitute sharing legal fees with nonlawyers as prohibited by Rule 3.2. The fee paid to the employee leasing company for its bookkeeping services is not tied to specific legal fees paid to Law Firm X by a client or to the firm's gross legal fees. There is no direct relationship between the payment to the leasing company and legal fees paid to the firm.

The arrangement is not misleading to the public in violation of Rule 2.1, and does not affect the quality of representation afforded to clients by the firm. The committee does not perceive that the ability of leased associates to exercise independent professional judgment on behalf of Law Firm X's clients as required by Canon V would be adversely impacted by the arrangement. Under the arrangement as proposed, the leasing company has no control over the lawyers' independent judgment, and supervisory responsibility for the associates rests exclusively with Law Firm X. Confidences of Law Firm X's clients are to be maintained and all provisions of the Rules of Professional Conduct are to be followed. Essentially, the associates' position with the firm and with its clients remains the same as if the associates were paid directly by the firm.

As a precaution, however, this committee recommends a written lease agreement between the leasing company and the law firm clearly setting forth the scope of the employment relationship and specifically applying the Rules of Professional Conduct to the relationship between the law firm and the leased associates.

This opinion overrules CPR 365.

### RPC 105

April 12, 1991

#### Public Defender Serving on the School Board

*Opinion rules that a public defender may represent criminal defendants while serving on the school board.*

#### Inquiry:

Fines and forfeitures in criminal cases are payable to the county board of education. May an attorney who serves on the board of education also represent persons accused of crimes as the public defender?

#### Opinion:

Yes. Although the interests of the school board in realizing maximum revenue from fines and forfeitures might, as a theoretical matter, conflict with the defendant's interest in minimizing such penalties, as a practical matter any such

conflict would be *de minimis* and would not materially limit the attorney's representation of the defendant. Rule 5.1(b).

In making this determination, the committee notes that statistics show that funds realized from the collection of fines and forfeitures constitute only a minute portion of the total funding of public schools in North Carolina. The committee is also advertent to the fact that in many cases county appropriations for school administration are decreased as the collection of fines and forfeitures increases on a dollar-for-dollar basis so that there is no net benefit to the local school board from extraordinary collections of fines or forfeitures.

### RPC 106

July 12, 1991

[Editor's Note: This opinion was originally published as RPC 106 (Revised).]

#### Fee Refunding

*Opinion discusses circumstances under which a refund of a prepaid fee is required.*

#### Inquiry:

Lawyer A was retained by Clients B and C to represent their son, D, who was charged with two first degree sex offenses. Lawyer A charged and collected a flat fee of \$17,500 to represent D through trial in Superior Court on both charges. Several weeks after A was employed, the state elected to take a voluntary dismissal rather than put the child victim on the stand at the probable cause hearing. The grand jury has not yet returned an indictment. B and C evidently regard the matter as concluded and have demanded return of a substantial portion of the fee. Although there was no written fee contract and no specific negotiation between A and B and C regarding whether the fee might under any circumstances be refundable, Lawyer A considers the fee to be nonrefundable.

Must Lawyer A refund any portion of the fee?

#### Opinion:

It is clear that an attorney may never charge or collect a fee which is clearly excessive. Rule 2.6(a). It is necessary then for Attorney A to consider all of the circumstances associated with the case in retrospect for the purpose of determining whether the fee in question was reasonable. To the extent that the fee charged and collected exceeded a reasonable fee under the circumstances, a refund would be necessary. Rule 2.8(a)(3).

### RPC 107

April 12, 1991

#### Alternative Dispute Resolution

*Opinion rules that a lawyer and her client may agree to employ alternative dispute resolution procedures to resolve disputes between themselves.*

**Inquiry #1:**

The Private Adjudication Center is an affiliate of the Duke University School of Law, Durham, North Carolina ("P-A-C"). The P-A-C has been organized for a number of years and has developed a successful program and procedures for alternative dispute resolution.

Would it be unethical for a lawyer to suggest to a client that the lawyer and client agree in their employment contract to refer any future dispute arising out of their contractual relationship to the Private Adjudication Center at the Duke Law School for binding resolution under one or more of its alternative dispute resolution procedures?

**Opinion #1:**

No. As a matter of professionalism, lawyers should avoid litigation to collect fees wherever possible. In that regard lawyers are encouraged to employ reasonably available alternative forms of dispute resolution.

**Inquiry #2:**

Would it be unethical for a lawyer to require such an agreement by including in all engagement letters and employment contracts a provision such as:

Any dispute arising under this contract for legal services will be referred to the Private Adjudication Center and the resolution of such dispute shall be binding on the parties to this agreement;

PROVIDED, that no such agreement shall be construed as designed to divest the North Carolina State Bar of its authority or responsibility for disciplinary action for breaches of professional ethics, or otherwise used by the lawyer to evade the consequences of unethical conduct.

**Opinion #2:**

No.

**Inquiry #3(a):**

Would the ethics opinion be different if the agreement were nonbinding on either party?

**Opinion #3(a):**

No.

**Inquiry #3(b):**

Would the ethics opinion be different if the agreement were binding upon the lawyer but nonbinding upon the client?

**Opinion #3(b):**

No.

**Inquiry #3(c):**

Would the ethics opinion be different if the agreement provided that the nonbinding results could be used in any future litigation to the extent permitted under rules of evidence and procedure (or could not be used in any way)?

**Opinion #3(c):**

No.

**Inquiry #3(d):**

Would the ethics opinion be different if the agreement provided that binding results could be pled in bar of any future covered claims?

**Opinion #3(d):**

No.

**Inquiry #3(e):**

Would the ethics opinion be different if the agreement contained a statement that either party has a right to the advice and use of independent counsel at any state of the negotiation of the employment contract or the resolution of any dispute arising out of such employment.

**Opinion #3(e):**

No.

**Inquiry #4:**

Are agreements for the private resolution of disputes between attorneys and clients subject to any restriction or limitation if there is no pre-dispute agreement?

**Opinion #4:**

Such agreements would be appropriate assuming that the nature of the alternative dispute resolution procedures is fully disclosed to the client and the client is given full opportunity to consult independent counsel relative to the wisdom of foregoing other possible remedies in favor of alternative dispute resolution.

**RPC 108**

[Editor's Note: RPC 108 was withdrawn on April 11, 1991, and no revised opinion was published under this number.]

**RPC 109**

January 17, 1992

[Editor's Note: This opinion was originally published as RPC 109 (Revised).]

**Representation of Parents Individually and as Guardians Ad Litem**

*Opinion rules that a lawyer may not represent parents as guardians ad litem for their injured child and as individuals concerning their related tort claim after having received a joint settlement offer which is insufficient to fully satisfy all claims.*

**Inquiry #1:**

Y, the infant son of Mr. and Ms. X, received serious injuries during the course of his birth. Y was profoundly brain damaged as a result of those injuries and will always require around-the-clock institutional care. Mr. and Ms. X have qualified and have been duly appointed as guardians ad litem for Y. They have employed law firm A to represent them in regard to their claim against the obstetrician for negligent infliction of emotional distress. As guardians ad litem, they have also employed law firm A to represent Y's interest in prosecuting a claim for damages relating to alleged medical malpractice. It is apparent that the obstetrician's insurance company would like to settle the case.

Assuming the above facts, what are the ethical considerations for attorneys in law firm A under the following four different settlement scenarios?

Insurance company agrees to settle for a lump sum and tells law firm A to disburse the funds

between the parents and the child as the attorneys see fit.

**Opinion #1:**

Under the facts presented in the inquiry, the attorneys in law firm A represent conflicting interests which cannot be reconciled. Rules 5.1(a), 5.1(b) and 5.7. It is clear that in this scenario, every dollar made available to one of the firm's clients will diminish the amount of the settlement offer funds available to satisfy the claim of the other client.

The parents have a conflict of interest between their personal claims and the claims of the child for whom they are fiduciaries. An attorney may not ethically assist clients in putting themselves in a position where there is a conflict of interest between their personal claims and their fiduciary responsibilities. When, as here presented, the claims are in a conflict situation, the attorney may not ethically represent both claimants and may not divide up a joint offer.

Under the circumstances, law firm A must withdraw from representing both clients. The attorneys may not continue representing either of their clients unless their continuing participation is intelligently consented to by the other client, and this is impossible under the facts stated.

**Inquiry #2:**

Parents insist that law firm A present child's claim and parents' claim separately, but equal in value, to the insurance company. The attorneys know that parents' claim is traditionally not worth as much as the child's claim, but that the insurance company will be willing to negotiate a settlement as long as the aggregate of both claims does not exceed the insurance company's previous lump sum offer.

**Opinion #2:**

See the opinion in response to inquiry one.

**Inquiry #3:**

Insurance company offers one million dollars on the child's claim and one hundred thousand dollars for the parents' claim and will only settle if both claims are discharged. The parents decline on the grounds that the offer to them is inadequate. The attorneys feel that the offer on the child's claim is a superior offer and that the parents' conflict of interest is preventing them from acting in the best interests of the child.

**Opinion #3:**

See the opinion in response to inquiry one.

**Inquiry #4:**

Insurance company insists that any offers of settlement shall be a lump sum for both claims. Parents cannot agree how the money should be divided. The attorneys petition the court to hear evidence of the separate claims of parents and child and make a distribution of the funds.

**Opinion #4:**

See the opinion in response to inquiry one.

## RPC 110

October 18, 1991

[Editor's Note: This opinion was originally published as RPC 110 (Revised).]

### Attorneys Retained by Liability and Underinsured Motorist Insurers

*Opinion rules that an attorney employed by an insurer to defend in the name of the defendant pursuant to underinsured motorist coverage may not communicate with that individual without the consent of another attorney employed to represent that individual by her liability insurer and that the attorney employed by the liability insurer may not take a position on behalf of the insured which is adverse to the insured.*

#### Inquiry #1:

Driver One sued Driver Two for personal injuries sustained in a motor vehicle accident. The automobile liability insurance company (Liability Co.) that provided coverage to Driver Two retained Attorney X, who has appeared for and is engaged in the defense of Driver Two. Driver One has underinsured motorist coverage with UIM Co., and UIM Co. has retained Attorney Y to appear in the lawsuit to protect the interest of UIM Co. by defending in the name of Driver Two pursuant to G.S. 20-279.21(b)(3)a and 20-279.21(b)(4).

Liability Co. now wishes to pay its coverage and be relieved of any further liability or obligation to defend. Liability Co. has retained Attorney Z to petition the court for an order allowing that relief, pursuant to G.S. 20-279.21(b)(4). UIM Co. has instructed Attorney Y to oppose the petition as it relates to Liability Co.'s duty to defend.

Driver Two has not retained independent counsel to represent him in connection with the lawsuit or the petition by Liability Co.

May Attorney Y communicate with Driver Two concerning the defense of the lawsuit, without the consent of Attorney X?

#### Opinion #1:

No. Although the answer may depend on unresolved issues of statutory interpretation, UIM Co. has a statutory right (but not necessarily a duty) to defend the suit in the name of Driver Two. Thus, Attorney Y owes his allegiance to the court and UIM Co. whose interest may or may not be aligned with the interest of Driver Two on particular issues or at various times. For example, UIM Co. will initially share the interest of Driver Two in preventing or reducing recovery by Driver One, but UIM Co. may later be adverse to Driver Two on the same issues if UIM Co. becomes the subrogee of Driver One. Because Driver Two is represented by Attorney X (see RPC 56), Attorney Y (as counsel for UIM Co.) must obtain the consent of Attorney X to communicate with Driver Two. Rule 7.4(a). To avoid frustrating the rights granted to UIM Co. by the underinsured motorist statute, Attorney X should normally consent to

communication on any issue where the interests of UIM Co. and Driver Two are aligned. However, Attorney Y should fully disclose his role to Driver Two, and Attorney X should have the opportunity to be present during the communication between Attorney Y and Driver Two.

#### Inquiry #2:

May Attorney X represent Driver Two in connection with Liability Co.'s petition to be relieved of its obligation to defend Driver Two?

#### Opinion #2:

No. Because Attorney X represents both the insurer (Liability Co.) and the insured (Driver Two), his representation of the insured would be materially limited by his responsibility to the insurer and he could not reasonably believe otherwise. Rule 5.1, RPC 91 and RPC 92. However, Attorney Y, representing the interest of UIM Co. as an unnamed party, may appear in opposition to the petition of Liability Co.

## RPC 111

July 12, 1991

### Representation of Insured and Insurer

*Opinion rules that an attorney retained by a liability insurer to defend its insured may not advise insured or insurer regarding the plaintiff's offer to limit the insured's liability in exchange for consent to an amendment of the complaint to add a punitive damages claim.*

#### Inquiry:

Driver One sued Driver Two for personal injury sustained in a motor vehicle accident. Driver One is represented by Attorney A. The automobile liability insurance company (Liability Co.) that provided coverage to Driver Two retained Attorney X, who has appeared for and is engaged in the defense of Driver Two.

The complaint filed by Attorney A seeks only compensatory damages. It does not allege conduct by Driver Two that would support a claim for punitive damages and does not ask for punitive damages. However, there is evidence that Driver Two was driving while impaired, and that evidence is probably sufficient to support a claim for punitive damages.

On behalf of Driver One, Attorney A has moved to amend the complaint to seek punitive damages and allege the requisite conduct by Driver Two. Attorney A has also proposed to Attorney X that the parties enter into a binding consent order, stipulation, or other agreement allowing Driver One's motion to amend the complaint, but providing further that (a) no judgment for punitive damages shall be enforceable against either Driver Two or Liability Co. and (b) no judgment for compensable damages shall be enforceable in excess of the auto liability insurance coverage provided by Liability Co.

The proposal appears to be in the best interest of Driver Two, because it would fully protect Driver Two from personal liability and would put at risk only the liability coverage provided by Liability Co.

It is the position of Liability Co. that it provides no coverage to Driver Two for punitive damages.

#### Inquiry #1:

How should Attorney X handle the proposal communicated by Attorney A?

#### Opinion #1:

Because Attorney X represents both the insured (Driver Two) and the insurer (Liability Co.) in connection with the defense of the action, Attorney X has an obligation to communicate the proposal to both of them. Rule 6. However, because of the potential conflict between the interests of the insured (who would likely favor the agreement) and the insurer (who may be adversely impacted by the amended complaint), Attorney X may not advise either of them concerning the advisability of accepting the proposal. See RPC 91. Rule 5.1. Attorney X should advise the parties that it would be appropriate to consider employing separate counsel on the limited questions presented.

#### Inquiry #2:

Does Attorney X's assessment of the probability of an adverse verdict, on issues of liability for compensatory or punitive damages, make a difference?

#### Opinion #2:

No.

#### Inquiry #3:

Does it make any difference whether, in the opinion of Attorney X, any verdict against Driver Two for damages, if reached, will probably be much less than, or somewhere close to, or much more than, the liability coverage that Liability Co. has agreed it provided Driver Two?

#### Opinion #3:

No.

## RPC 112

July 12, 1991

### Representation of Insured and Insurer

*Opinion rules that an attorney retained by an insurer to defend its insured may not advise insurer or insured regarding the plaintiff's offer to limit the insured's liability in exchange for an admission of liability.*

#### Inquiry:

Driver One sued Driver Two for personal injury sustained in a motor vehicle accident. Driver One is represented by Attorney A. The automobile liability insurance company (Liability Co.) providing coverage to Driver Two retained Attorney X, who has appeared for and is engaged in the defense of Driver Two.

The complaint filed by Attorney A seeks only compensatory damages. It does not allege conduct by Driver Two that would support a claim for punitive damages and does not ask for punitive damages. There is no known evidence to support an allegation of conduct on the part of Driver Two that would support a claim for puni-

tive damages, and liability for the accident is unclear.

Attorney A has proposed to Attorney X that the parties enter into a binding consent order, stipulation, or other agreement which would provide that Driver Two admits liability for damages arising out of the accident, but would provide further that no judgment shall be enforceable in excess of the auto liability insurance coverage provided by Liability Co.

The proposal appears to be in the best interest of Driver Two, because it would fully protect Driver Two from personal liability and would put at risk only the liability coverage that Liability Co. has agreed it provides to Driver Two.

**Inquiry #1:**

How should Attorney X handle the proposal communicated by Attorney A?

**Opinion #1:**

Because Attorney X represents both the insured (Driver Two) and the insurer (Liability Co.) in connection with the defense of the action, Attorney X has an obligation to communicate the proposal to both of them. Rule 6. However, because of the potential conflict between the interests of the insured (who would likely favor the agreement) and the insurer (who may be adversely impacted by the admission), Attorney X may not advise either of them concerning the advisability of accepting the proposal. See RPC 91. Rule 5.1. Attorney X should advise the parties that it would be appropriate to consider employing separate counsel on the limited questions presented.

**Inquiry #2:**

Does Attorney X's assessment of the probability of an adverse verdict, on issues of liability for compensatory or punitive damages, make a difference?

**Opinion #2:**

No.

**Inquiry #3:**

Does it make any difference whether, in the opinion of Attorney X, any verdict against Driver Two for damages, if reached, will probably be much less than, or somewhere close to, or much more than, the liability coverage that Liability Co. has agreed it provided Driver Two?

**Opinion #3:**

No.

## **RPC 113**

July 12, 1991

### **Legal Advice Concerning Lien Rights**

*Opinion rules that a lawyer may disclose information concerning advice given to a client at a closing in regard to the significance of the client's lien affidavit.*

**Inquiry #1:**

A lender (Mortgagee) loaned money to an owner (Owner). The note evidencing the loan was to be secured by a first lien deed of trust on certain real property that had been owned by the

Owner for some period of time prior to the closing of the loan. An attorney (Attorney) represented both the Owner and the Mortgagee at the closing of the loan. The Mortgagee required, and instructed the Attorney, that, as a condition to the closing of the loan, a mortgagee's title insurance policy be obtained by the Attorney with respect to Mortgagee's first lien deed of trust. The title insurance company, as a condition to issuing the title insurance policy, required the usual owner's affidavit with respect to mechanics liens.

During the course of the closing of the loan, the Owner executed the usual owner's affidavit running in favor of the title insurance company in which the Owner "certified" that no third parties had any rights to any "mechanics liens" on the real property.

Subsequent developments indicate that, in fact, at least one third party had "mechanics lien" rights which, because of the relation back to the commencement of the work on the Owner's real property, may be superior to the lien of the deed of trust in favor of the Mortgagee.

Litigation has now been commenced against the Mortgagee and the Owner by the contractor who claims a mechanics lien superior to the rights of the Mortgagee in the subject real property. The Mortgagee and the title insurance company have employed counsel (Counsel), other than Attorney, and the Owner has advised Counsel that the Owner did not realize that he was signing an affidavit certifying that there were no mechanics lien rights superior to that of the deed of trust. Counsel for the Mortgagee and title insurance company has inquired of Attorney what Attorney told the Owner about the affidavit before it was executed by the Owner.

Based on the foregoing:

Can Attorney advise Counsel as to the nature and extent of his conversation to Owner at the closing with respect to the affidavit?

**Opinion #1:**

Yes. Rule 4(c)(5)

**Inquiry #2:**

Can Attorney advise Counsel as to the nature and extent of Owner's conversation to Attorney at closing with respect to the affidavit?

**Opinion #2:**

Yes. See the answer to question #1.

**Inquiry #3:**

Would the answers to 1 and 2 be any different if Attorney was asked the questions in a deposition taken in connection with the litigation?

**Opinion #3:**

No.

## **RPC 114**

July 12, 1991

### **Advising the Pro Se Litigant**

*Opinion rules that attorneys may give legal advice and drafting assistance to persons wish-*

*ing to proceed pro se without appearing as counsel of record.*

**Inquiry #1::**

Carolina Legal Services (CLS) represents indigent clients who are unable to afford private attorneys. Each client must meet income eligibility requirements in addition to having a type of case which fits within CLS's priority guidelines. All of CLS's attorneys carry a heavy caseload and the private bar is not always able to do enough through its own pro bono efforts to help meet all the legal needs of the indigent citizens in the community.

**First Hypothetical:**

An indigent person comes to CLS. She and her husband have recently separated and she has no job, no money and cannot afford to hire an attorney. Due to her marital situation, she has ample grounds for an alimony claim, which could be accomplished through a divorce from bed and board. She would like to file some sort of action, possibly a divorce from bed and board, to obtain some temporary alimony, child custody and child support. Unfortunately, CLS cannot represent her.

Can a CLS attorney draft a complaint seeking divorce from bed and board for the woman, explain to her how to file it, have the woman sign her name on all the pleadings, go over courtroom procedure with her, but allow her to represent herself in court *pro se* and not list herself as the attorney of record?

**Opinion #1:**

Yes, as the comment to Rule 3.1 makes clear, an attorney may counsel nonlawyers who wish to proceed *pro se*. In so doing an attorney may provide assistance in the drafting of legal documents, including pleadings. When an attorney provides such drafting assistance, the Rules of Professional Conduct do not require the attorney to make an appearance as counsel of record.

**Inquiry #2:**

Are there court approved pleading forms that CLS attorneys can give the woman to sign and file *pro se*?

**Opinion #2:**

If such forms exist, attorneys may make them available to individuals wishing to proceed *pro se*.

**Inquiry #3:**

Are the ethical considerations the same if CLS attorneys make their own form pleadings available to the indigent woman to sign and file *pro se*?

**Opinion #3:**

See the answer to question #1.

**Inquiry #4:**

Assuming a CLS attorney can do the above, is there a difference, ethically, as to which party, the attorney or the woman, actually drafts the pleadings or fills out any court approved forms which may exist, so long as the attorney clearly states that she is not representing the woman, but is merely helping her with her lawsuit?

**Opinion #4:**  
No.

**Inquiry #5:**  
**Second Hypothetical:**

A man comes into CLS's office. He has just been served with a custody complaint by his ex-wife. CLS cannot take the case. The man is willing to consent to his ex-wife's having custody but wants to make sure that his rights are protected as far as visitation, etc.

Can a CLS attorney draft an answer for him without signing the pleading if she lets him know that she is not representing him and that he must proceed *pro se*?

**Opinion #5:**  
See the answer to question #1 above.

**Inquiry #6:**  
If a CLS attorney is not the attorney of record, how much leeway would such an attorney have in advising the man on how to represent himself in court if he and his ex-wife are unable to settle the custody matter? Can the attorney instruct him on which witnesses to call, what evidence to present and how to give an opening and closing argument? Can the attorney fill out subpoenas for him or instruct him on how to fill them out himself?

**Opinion #6:**  
Nothing in the Rules of Professional Conduct prohibits a lawyer from volunteering advice regarding strategy, tactics or techniques of litigation. As was mentioned above, an attorney volunteering assistance to an individual wishing to proceed *pro se* may offer assistance in drafting documents or completing forms.

**Inquiry #7:**  
**Third Hypothetical:**

A woman consults CLS about stopping the physical abuse that her husband frequently subjects her to. She has already taken out an assault warrant, but wants to proceed *pro se* with a 50B Domestic Violence Protective Complaint. No CLS attorney can represent her in court.

Can a CLS attorney fill out the 50B complaint for her based on the information she has given and have her proceed *pro se*?

**Opinion #7:**  
Yes.

**Note:** While it appears ethically permissible for an attorney to volunteer assistance of the sort described above without appearing as counsel of record, it is noted that attorney-client relationships would generally be formed under such circumstances and the Rules of Professional Conduct, particularly those concerning confidentiality and conflict of interest would apply. The Ethics Committee offers no opinion on the question of whether attorneys undertaking to offer such voluntary assistance might be liable for malpractice but suggests that any lawyer acting in such capacity would be required by Rule 6 to act competently in offering advice and assistance.

## RPC 115

October 18, 1991

### Sponsorship of Legal Information

*Opinion rules that a lawyer may sponsor truthful legal information which is provided by telephone to members of the public.*

#### Inquiry:

Audio Services, Inc. ("Audio Services") provides by telephone free information ranging from health to news and weather to the general public. It is a for-profit organization which does business in fifteen states and in Canada. The service includes certain free legal information, the content of which has been written and/or approved by attorneys in the state in which the information is made available. The legal information is provided through a recorded message which can be heard by dialing a free local number. Attorneys who want to participate in the Audio Services program pay a fee in exchange for recorded advertising announcements in the telephone portion of the service. These advertisements consist of a 10-second announcement prior to the recorded legal information and a 15-second announcement following the information. After the last recorded announcement, the caller has the option to dial a single number on the telephone in order to be directly connected with the law firm making the advertisement or to dial a different number to receive a free pamphlet on the subject of his inquiry. The printed portion of the service in the telephone directory does not include any advertisement by the participating attorneys.

Does participation by a North Carolina attorney in the Audio Services program violate the North Carolina Rules of Professional Conduct?

#### Opinion:

No, assuming that the advertising material in question is not false or misleading as defined in Rule 2.1 of the Rules of Professional Conduct.

Rule 2.2(a) allows a lawyer to advertise through public media. Public media includes media such as "telephone directories, legal directories, newspapers or other periodicals, outdoor advertising, radio or television or written communications not involving solicitation" as defined in Rule 2.4. Although recorded telephone announcements are not included in the listing of accepted advertising media, the use of the words "such as" indicates that other types of media not listed within the rule are acceptable. Since the listing of acceptable advertising media includes printed, audio and audio/visual forms, recorded telephone announcements should also be acceptable. The recorded announcements are subject to Rule 2.2(b) which requires that a recording of the advertisements must be kept for two years after their last dissemination along with a record of when and where they were used, and to Rule 2.2(d) which requires that the recorded announcements must

include the name of at least one lawyer or law firm responsible for their content.

Rule 2.4(a) states that, "[a] lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain." Since there is not in-person or live telephone contact between the person in need of legal services and the lawyer until such person elects to dial another number after the recorded messages, the recorded advertisements do not violate Rule 2.4(a).

Rule 2.4(c) requires that the words, "This is an advertisement for legal services" be included at the beginning and ending of any "recorded communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter and with whom the lawyer has no family or prior professional relationship." Since a caller must be presumed to be in need of legal services, the recorded messages must include the statement described in Rule 2.4(c).

Rule 3.1 prohibits an attorney from aiding "a person not licensed to practice law in North Carolina in the unauthorized practice of law." NCGS. 84-2.1 defines, in relevant part, the practice of law as: "performing any legal service for any other person, firm or corporation, with or without compensation." In addition, it is necessary that the person charged shall have customarily or habitually held himself out to the public as a lawyer, or that he has demanded compensation for his services as such. *State v. Bryan*, 98 N.C. 644, 4 S.E. 522 (1887). Since the recorded legal information contains legal information describing the law in general, it is not "a legal service for any person, firm or corporation." Neither does Audio Services hold itself out as an attorney or law firm. Therefore, the attorneys who participate in the Audio Services program would not be aiding the unauthorized practice of law.

## RPC 116

October 18, 1991

### Partnership Between Lawyers

*Opinion rules that lawyers may not hold themselves out as practicing in a partnership unless the lawyers are actually partners.*

#### Inquiry:

An issue has arisen as to whether a particular "partnership agreement" creates a proper partnership under the provisions of the Rules of Professional Conduct for purposes of two attorneys holding themselves out to the public as a law partnership.

The issue arises in the context of a threatened legal malpractice claim in which a former client alleges negligent representation by one of the two attorneys in the "partnership." Although the law does not permit a plaintiff to base a claim

of malpractice on an ethical violation, the attorney believed the partnership agreement to be a valid partnership agreement. The two attorneys practiced law under their two names, have stationery with their two names, etc.

The partnership agreement in question is largely concerned with shared office expenses. It also contemplates the likelihood of sharing certain cases (and fees related to those shared cases). The dollar volume of the cases shared in 1990 was not insubstantial. The particular case which is the subject of the threatened litigation was not one of the shared cases. In fact, the partnership agreement was not entered into at the time the initial retainer agreement was executed. However, the partnership agreement was executed prior to the alleged negligent act.

Must the two attorneys make any changes in their partnership agreement to be in compliance with the Code of Professional Responsibility?

#### **Opinion:**

Rule 2.3(E) forbids a lawyer from holding himself or herself out as practicing in a law firm unless the association is in fact a firm. The question of whether the business association in question is a bona fide partnership or, in the parlance of the rule, a "firm," is a legal question beyond the purview of the Ethics Committee. If as a matter of law the association in question is a bona fide partnership, it is obvious that the attorneys may continue to hold themselves out as partners. If, on the other hand, the arrangement is not a bona fide partnership, it would be unethical for the attorneys involved to continue to represent that they are partners.

### **RPC 117**

July 17, 1992

[Editor's Note: This opinion was originally published as RPC 117 (Revised).]

#### **Reporting Contagious Disease**

*Opinion rules that a lawyer may not reveal confidential information concerning his client's contagious disease.*

#### **Inquiry:**

During the course of representation, Attorney L learned that Client C has a contagious disease which can be transmitted through casual contact in a normal everyday setting. The client currently works as a waiter. Lawyer L has consulted with a public health official concerning the disease in question but has not revealed the name of the client. Lawyer L was informed by the public health official that although the disease is contagious and can be transmitted by touch, quarantine is not warranted under the circumstances. Had the disease been more serious, could Lawyer L have reported the identity of the client to the local public health authorities along with the information that the client is infected without the client's consent?

#### **Opinion:**

No. Since the subject information was gained in the professional relationship and disclosure

would likely be embarrassing or detrimental to the client, it must be considered confidential information which is protected from disclosure by Rule 4(b) of the Rules of Professional Conduct. This would be true regardless of the seriousness of the client's disease. See RPC 120.

### **RPC 118**

October 18, 1991

#### **Waiver of Affirmative Defense**

*Opinion rules that an attorney should not waive the statute of limitations without the client's consent.*

#### **Inquiry:**

Can an attorney who is retained by an insurer to defend a tort claim grant an extension of the statute of limitations on behalf of both the insurer and the insured, or would an extension of time have to be obtained directly from the insured?

#### **Opinion:**

Unless the insured has by contract surrendered to the insurer the authority to waive affirmative defenses, no such waiver should be undertaken by the attorney without the consent of the insured. In a typical liability case, the lawyer employed by the insurer would represent both the insurer and the insured. The insured would be considered the lawyer's primary client. RPC 92. Generally speaking, a lawyer is obliged by Rule 7.1 of the Rules of Professional Conduct to "seek the lawful objectives of his client through reasonably available means permitted by the law and these rules, . . ." It is further provided that "a lawyer does not violate this rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, . . ." Because the waiver of an affirmative defense, such as the statute of limitations, would be prejudicial to the rights of the client, the insured, it would be necessary for the insured to consent to a waiver.

### **RPC 119**

October 18, 1991

#### **Communication Between Opposing Parties**

*Opinion rules that an attorney may acquiesce in a client's communication with an opposing party who is represented without the other attorney's consent, but may not actively encourage or participate in such communication.*

#### **Inquiry:**

Attorney A represented a passenger who suffered serious injuries when thrown from an auto driven by a fraternity friend who was represented by Attorney B. Attorney B also represented the father of the driver under family purpose allegations. Attorney C represented the liability carrier. The injuries sustained by the plaintiff were severe and the liability carrier indicated that it would pay its limits. The principal issue was the contribution of the driver and his father. A few days before the scheduled

trial and after inconclusive negotiations between the attorneys on the excess aspect, Attorney B permitted his client, the driver, to telephone Attorney A's client who was a military officer in another state in an effort to negotiate a settlement. Attorney A had no knowledge of the communication until receiving a call from his client. Confusion resulted over what the plaintiff agreed to accept. Attorney A protested to Attorneys B and C concerning the direct communication with his client. Again, without the knowledge of Attorney A but with the permission of Attorney B, the defendant-driver contacted Attorney A's client and attempted to resolve the amount and method of paying the excess.

Is it permissible for an attorney to allow his client to contact the adverse party and attempt to negotiate settlement without the knowledge or permission of the attorney for the adverse party, even though at one time the parties may have been close friends?

#### **Opinion:**

Yes. Opposing parties themselves may communicate with each other with or without the consent of their lawyers about any matters they deem appropriate. Such communications may include efforts to negotiate a resolution of a controversy between the parties, the results of which may be reported to the parties' lawyers. At the same time Rule 7.4(a) provides: "During the course of his representation of a client, a lawyer shall not: (1) communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so." Although client contact with the opposing represented party can be allowed or permitted by the attorney, the attorney cannot cause (by active encouragement, client preparation, or personal participation) such communication so as to accomplish indirectly what he or she could not do directly due to the prohibition of Rule 7.4(a). The lawyer must be careful to distinguish between active encouragement and participation on the one hand and passive acquiescence on the other. It is improper for the attorney to use his or her client as an agent, or to use any other actual agent of the attorney, to communicate with the opposing represented party in violation of Rule 7.4(a).

This opinion supersedes CPR 150.

### **RPC 120**

July 17, 1992

[Editor's Note: This opinion was originally published as RPC 120 (Revised).]

#### **Reporting Child Abuse**

*Opinion rules that, for the purpose of the Rules of Professional Conduct, a lawyer may, but need not necessarily, disclose confidential*

information concerning child abuse pursuant to a statutory requirement.

**Inquiry:**

Attorney A represents Clients H and W who are the parents of three minor children. During the course of the representation, H and W inform Attorney A of a matter unrelated to the representation, namely, that the minor children are the victims of continuing emotional and/or sexual and/or physical abuse.

GS 7A-543 generally requires that "any person or institution who has cause to suspect that any juvenile is abused or neglected shall report the case of that juvenile to the director of the Department of Social Services in the county where the juvenile resides or is found." The rule does not except from its terms attorneys whose suspicions are aroused by information received in confidence. Must Attorney A report the abuse of H and W's children to the director of the Department of Social Services against the wishes of her clients H and W?

**Opinion:**

No. A lawyer is not ethically required to report the child abuse under the facts described in the inquiry. Rule 4(b)(1) generally prohibits a lawyer from knowingly revealing confidential information of her client. The information in question is certainly confidential information as that term is defined in Rule 4(a) in that it was gained in the professional relationship, the clients have requested that it be held inviolate, and its disclosure would likely be embarrassing or detrimental to the clients. Rule 7.1(a)(3) states that a lawyer shall not intentionally prejudice or damage his or her client during the course of the professional relationship. Despite the language used by G.S. 7A-543 ("any person" shall report suspected child abuse or neglect to the director of the Department of Social Services in that county), there is nothing in Chapter 7A, Article 44, of the North Carolina General Statutes on "Screening of Abuse and Neglect Complaints" that abrogates attorney-client confidentiality or privilege (G.S. 7A-551 specifically abrogates the physician-patient and psychologist-client privileges, while not mentioning the attorney-client privilege).

Recognizing the State Bar's lack of authority to rule on questions of law, and rendering this opinion as an ethical matter only, until such time as our courts should dispositively rule that G.S. 7A-543 abrogates client confidentiality and privilege and requires a lawyer to report child abuse, Rule 4 controls and the lawyer is not ethically required to report child abuse (from information gained in the professional relationship), and the failure to so report will not be deemed a violation of Rule 1.2(b) and (d) and/or Rule 7.2(a)(3). In other words, although a lawyer failing to report suspected child abuse might sometime be criminally prosecuted pursuant to G.S. 7A-543, the State Bar will not treat this conduct as unethical under the present state of the law.

The above notwithstanding, it is possible that the exception contained in Rule 4(c)(4) might justify the disclosure of the confidential information in question. That provision authorizes an attorney to disclose confidential information regarding the intention of her clients to commit a crime. If Attorney A in this situation is satisfied that her clients intend to continue abusing their children, disclosure would certainly be allowed by this exception to the general rule.

Further, because G.S. 7A-543 is unclear and subject to being interpreted as abrogating attorney-client confidentiality and privilege, until our courts settle the legal question, an attorney will be allowed, in his or her discretion, to interpret G.S. 7A-543 as requiring such report and thus may ethically report the information gained through the confidential relationship concerning child abuse under the exception to Rule 4(b) contained in Rule 4(c)(3) to the effect that confidential information may be disclosed when "required by law."

This inquiry and response has focused solely on reporting suspected, but unknown and previously unreported, past and possibly ongoing child abuse, in order for it to be investigated and dealt with by the Department of Social Services. Once a client is accused of, under investigation for, or charged with child abuse that is a past act, attorney-client confidentiality and privilege would be protected by the client's constitutional rights to effective assistance of counsel, and it would be unethical to divulge such information gained in the professional relationship as to the client's past conduct.

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**RPC 121**

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October 18, 1991

**Legal Opinion for Nonclient**

*Opinion rules that a borrower's lawyer may render a legal opinion to the lender.*

**Inquiry:**

Lawyer A represents a borrower in negotiating a loan from a bank. The bank has a policy of requiring that counsel for its borrower render to it (the bank) a legal opinion that the loan in question and the terms of the loan do not violate any laws, including, without limitation, any usury laws or similar laws relating to the charging of interest.

May Lawyer A ethically render such an opinion to the bank?

**Opinion:**

Yes, Lawyer A may ethically render an opinion to the bank with the borrower's consent. The rendering of an opinion to the bank does not give rise to an attorney/client relationship between Lawyer A and the bank. Lawyer A is still representing the borrower only. Rule 5.1(a).

This opinion supersedes RPC 101.

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**RPC 122**

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January 17, 1992

**Judicial Consultations with the Attorney General**

*Opinion rules that a member of the attorney general's staff may not consult ex parte with a trial court judge if it is likely that that lawyer will represent the state in the appeal of the case.*

**Inquiry:**

May a member of the attorney general's staff engage in an *ex parte* communication with a trial court judge concerning the merits of a case pending before that judge in which the state, though a party, is not presently represented by the attorney general?

**Opinion:**

*Note: For the purposes of the Rules of Professional Conduct, disqualification is generally imputed within a law firm or its functional equivalent. Here it is assumed that within the organizational structure of the attorney general's office, a "division" is the functional equivalent of a law firm.*

A member of the attorney general's staff may not engage in such an *ex parte* communication if it is likely that that lawyer or a member of his or her division within the attorney general's office will be called upon to represent the state in the event of an appeal. Under such circumstances the member of the attorney general's staff must be treated as the alter ego of counsel for the state in the trial court, and any such communication would be tantamount to an illicit *ex parte* communication by the state's lawyer. Rule 7.10(b). The member of the attorney general's staff would also be disqualified for reasons of conflict of interest. The ability of such a lawyer to give the court disinterested advice would be materially limited by the fact that that lawyer or another member of that lawyer's division within the attorney general's staff would be expected to take a partisan role on behalf of the state on appeal. Rule 5.1(b).

The ethics committee has previously determined that the attorney general's office will not be treated as a monolithic law firm for the purposes of the Rules of Professional Conduct. RPC 55. Therefore, there is no ethical impediment to the attorney general's offering advice to a trial court judge in any case in which the state has an interest if the state will not be represented on appeal by the consulting lawyer or a member of the consulting lawyer's division within the attorney general's office. Under such circumstances the consulting attorney, though a member of the attorney general's staff, would be considered as belonging to a "firm" which is separate and apart from the division or "firm" within the office of the attorney general for which the lawyer ultimately assigned responsibility for the appeal works.

Once a member of the attorney general's staff undertakes to consult with a trial court judge on an *ex parte* basis, neither that lawyer nor any

other member of that lawyer's division within the attorney general's office should undertake to represent the state on appeal. This is necessary to avoid the appearance of impropriety. Canon X. Rule 9.2(a), though not dispositive, is supportive of this conclusion. In advising the court the consulting lawyer is in effect providing the services of a law clerk. Rule 9.2(a) prohibits a lawyer who has participated in a matter as a judge's law clerk from representing anyone in the same matter. The disqualification, which was designed to avoid the appearance of impropriety, is imputed to the other members of the lawyer's firm. The same concern justifies disqualification of the consulting lawyer and the other members of his or her division in the instant case.

The foregoing opinion is inapplicable to communications that are not *ex parte*. The trial court may avoid putting members of the attorney general's staff in the position of being precluded from participation in the case as advocates for the prosecution after having participated as advisors to the court by ensuring that all parties to the pending case are also parties to the communication.

## RPC 123

January 17, 1992

### Representation of Parents and Child

*Opinion rules that a lawyer may represent parents and an independent guardian ad litem for their child concerning related tort claims under certain circumstances.*

#### Inquiry:

A child is injured due to the apparent malpractice of a physician. Incident to the injury there accrues to the parents of the child a claim against the physician for negligent infliction of emotional distress. Under what circumstances, if any, may the same attorney represent the interests of the parents and the child?

#### Opinion:

*Note: This opinion is intended to address in a broader way the issues raised in RPC 109. It is offered for the general guidance of the bar and is not intended to contradict the advice given in response to the specific facts recited in RPC 109.*

Although the interests of the parents and the child are potentially in conflict, an attorney may represent the parents and through them the child in negotiating with the physician or his insurer prior to the initiation of litigation. Once a lawsuit is commenced, the attorney should insist upon the appointment of an independent guardian ad litem for the child. If it appears that the interests of the parents and the child will not necessarily conflict, the attorney may undertake to represent both with the intelligent consent of the parents and the child's independent guardian ad litem. Since the interests of the child and the parents would be inextricably linked in the establishment of the physician's liability for

negligence, it is unlikely that any actual conflict between the attorney's two clients would arise prior to the receipt of a settlement offer. Should the defendant make a joint offer requiring the plaintiffs to divide the proceeds, the potential conflict of interest would become actual. Given the fact that the attorney's clients are bound by family ties and would have economic interests which would not be necessarily antagonistic, the conflict of interest would not automatically disqualify the attorney from continuing the joint representation. In some instances it may also be appropriate for an attorney to attempt to assist his clients in evaluating their respective claims and in amicably agreeing to an equitable and appropriate division which could then be presented to the court for its approval. Under no circumstances may the attorney, while representing both clients, assume a role of advocacy for one as opposed to the other.

Should it become apparent to the attorney that his clients' conflicting interests cannot be mediated, the attorney will generally be required to withdraw from the representation of both. It is conceivable that the attorney may continue to represent one or the other with the consent of the former client whose case he relinquishes. Rule 5.1(d).

## RPC 124

January 17, 1992

### Costs of Class Action Litigation

*Opinion rules that a lawyer may not agree to bear the costs of federal class action litigation.*

#### Inquiry:

In a class action under Rule 23 of the Federal Rules of Civil Procedure, can the plaintiff's counsel agree to bear all or part of the costs of the litigation? In an ordinary civil suit, are there any circumstances under which the plaintiff's counsel can agree to bear the costs of litigation? If so, what are some of those circumstances?

#### Opinion:

An attorney may never ethically agree to be ultimately responsible for the costs of litigation. Rule 5.3(b) of the Rules of Professional Conduct allows a lawyer to advance the costs of litigation if the client remains ultimately liable for such expenses. The rule contains no exception for lawyers prosecuting class action litigation in federal court. It is therefore impermissible for an attorney to agree with his or her client to bear some or all of the costs of such litigation.

## RPC 125

January 17, 1992

### Disbursement of Settlement Proceeds

*Opinion rules that a lawyer may not pay a medical care provider from the proceeds of a settlement negotiated prior to the filing of suit over his client's objection unless the funds are subject to a valid lien.*

#### Inquiry:

Lawyer A represents a plaintiff in a personal injury action. During the course of settling the case, the attorney receives medical bills from medical care providers which treated the client for the personal injuries. Settlement is reached without the filing of a lawsuit. There is no dispute over the medical bills. The client instructs Lawyer A to pay all proceeds of the settlement over to her and to not pay the medical bills. The medical care providers have not taken the steps set forth in G.S. 44-49 to perfect the lien provided in that statute, but Lawyer A has actual notice of the bills (see G.S. 44-50). Does RPC 69 mandate that the attorney pay the settlement proceeds to the client rather than following the distribution scheme set forth in NCGS 44-50?

#### Opinion:

RPC 69 ruled that an attorney has an ethical obligation to disburse funds belonging to the client as instructed by the client in the absence of a valid lien in favor of a health care provider. Rule 10.2(E). From the standpoint of the Rules of Professional Conduct, the situation is the same regardless of whether the case is settled before or after the initiation of litigation. The interpretation of G.S. 44-50 is beyond the purview of the ethics committee. Suffice it to say that if that statute has the effect of imposing a lien upon settlement proceeds in the hands of an attorney when the attorney has received actual notice of the medical care provider's claim and suit has not been filed, then the attorney may pay the medical care provider's undisputed claim in spite of his client's objection. If, on the other hand, a lien is not perfected by the attorney's acquisition of actual notice under such circumstances, the attorney would have to abide by the instructions of the client in regard to the disbursement of the proceeds of settlement.

## RPC 126

April 17, 1992

### Letterhead Listing of Nonlawyers

*Opinion rules that nonlawyers may be listed as such on the letterhead of lawyers.*

#### Inquiry #1:

Guideline 9 of the Guidelines for Use of Nonlawyers in Rendering Legal Services which was adopted by the North Carolina State Bar in October of 1986 indicates that a legal assistant may not be included upon the employing lawyer's letterhead. The Paralegal Committee of the North Carolina State Bar is considering proposing an amendment to the guideline which would permit a nonlawyer to be listed on a lawyer's letterhead so long as the listing clearly indicates that the subject individual is a nonlawyer.

1. Would such listings be consistent with the Rules of Professional Conduct?

**Opinion #1:**

Yes. The Rules of Professional Conduct do not prohibit the listing of nonlawyers as *nonlawyers* on law firm letterhead. Rule 2.3(c) prohibits only the listing of persons not licensed to practice law in North Carolina as *attorneys* affiliated with the firm. It is, of course, necessary that any communication of a lawyer or law firm be presented in a manner which is not false, deceptive or misleading. See Rule 2.1. To ensure that the public is not led to believe that a nonlawyer is eligible to practice law, the nonlawyer's limited capacity should be clearly set forth on the letterhead.

**Inquiry #2:**

2. Would the answer to question 1 be different if the nonlawyer is a disbarred lawyer?

**Opinion #2:**

No.

**RPC 127**

April 17, 1992

**Conditional Delivery of Settlement Proceeds**

*Opinion rules that deliberate release of settlement proceeds without satisfying conditions precedent is dishonest and unethical.*

**Inquiry #1:**

Attorney D is regularly employed by an automobile liability insurance company to defend claims or litigation against its insureds, or against the insurance company when the claim is against other coverage that the company has provided (such as uninsured and underinsured motorist insurance coverage). When a settlement of any such claim or litigation is negotiated, Attorney D typically prepares the documents that he and his client or clients will require to conclude the settlement (the settlement documents). The settlement documents usually consist of a release, as well as a consent judgment, or a notice or a stipulation to effect a dismissal of any pending litigation.

Attorney D routinely sends the settlement documents to opposing counsel, Attorney P, with a letter which directs the manner in which the settlement is to be concluded with the use of the settlement documents by Attorney P.

Attorney D also sends the check or checks for the settlement proceeds to Attorney P with a letter stating that each check is conditionally delivered to Attorney P in trust and upon the condition that, while in some instances a check may be deposited in the trust account of Attorney P, no check may otherwise be delivered, and no proceeds from any check may be disbursed, by Attorney P until the settlement documents have been executed in the manner directed in the letter and returned to Attorney D.

With respect to this conditional delivery of a settlement check or its proceeds, is Attorney D a "client" of Attorney P as defined by Rule 10.1(b)(4)?

**Opinion #1:**

No.

**Inquiry #2:**

Is Attorney P required to render appropriate accountings to Attorney D with respect to the receipt, delivery or disbursement of a settlement check or its proceeds?

**Opinion #2:**

No.

**Inquiry #3:**

Has Attorney P violated a rule if he delivers a settlement check or disburses any of the proceeds from a settlement check in violation of any condition under which Attorney P received the settlement check?

**Opinion #3:**

Yes. Whenever an attorney accepts conditional delivery of settlement proceeds from opposing counsel, the attorney implicitly agrees to abide by the prescribed conditions. Any deliberate failure to abide by those conditions, such as by disbursing the proceeds without first having obtained a signed release, would be dishonest and violative of Rule 1.2(c) which prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation." It does not appear that such conduct would violate any of the provisions of Rules 10.1 or 10.2 since the obligations imposed by those rules are owed exclusively to clients and adverse counsel cannot properly be considered a client.

**Inquiry #4:**

Is Attorney D required by Rule 1.3(a) to inform the North Carolina State Bar if it comes to his attention that the settlement check has or may have been delivered, or that proceeds from the settlement check have or may have been disbursed by Attorney P without meeting a condition required for any such delivery or disbursement?

**Opinion #4:**

Not necessarily. Rule 1.3(a) requires only the reporting of violations of the Rules of Professional Conduct that raise substantial questions as to the offending lawyer's "honesty, trustworthiness or fitness as a lawyer in other respects . . ." A willful failure on the part of the attorney to whom such funds were entrusted to satisfy the conditions of tender would raise a substantial question about the lawyer's trustworthiness and would necessitate a report of the apparent violation to the State Bar. If, however, it appears that the failure to satisfy the conditions of tender resulted from mistake, as opposed to knowing disregard, a report of the misconduct would not be required. It should be noted that Rule 1.3 does not, in any case, require disclosure of confidential information. Rule 1.3(c).

**Inquiry #5:**

With respect to any obligation Attorney D might have to inform the North Carolina State Bar of Attorney P's misconduct, does it make any difference whether the conditions upon which a settlement check was delivered to Attorney P are subsequently satisfied, or whether the settlement is otherwise subsequently concluded

to the satisfaction of Attorney D and his client or clients?

**Opinion #5:**

If it appears to the attorney for the adverse party that Attorney D knowingly violated the conditions of tender, there would be a duty to report the apparent misconduct regardless of subsequent actions on the part of Attorney D to rectify the situation or otherwise satisfy Attorney P and his client.

**Inquiry #6:**

With respect to inquiries 4 and 5, does it make any difference whether Attorney D is also aware that Attorney P is or has been under investigation by the North Carolina State Bar for other alleged violations of Canon X or a rule promulgated thereunder?

**Opinion #6:**

The mere fact that Attorney P is aware that Attorney D is or has been under investigation by the State Bar for other alleged violations of the trust account rules would not necessarily compel a report of Attorney P's disbursement in violation of the conditions of tender. There may exist circumstances, however, in which an attorney becomes aware of a pattern of misconduct so pronounced as to warrant the conclusion that a similar violation was knowing and intentional. Under such circumstances, an attorney would have an obligation to report the misconduct to the State Bar.

**RPC 128**

April 16, 1993

[Editor's Note: This opinion was originally published as RPC 128 (Second Revision).]

**Communication with Adverse Corporation's House Counsel**

*Opinion rules that a lawyer may not communicate with an adverse corporate party's house counsel, who appears in the case as a corporate manager, without the consent of the corporation's independent counsel.*

**Inquiry:**

Attorney A represents plaintiff corporation in an action to recover life insurance proceeds under a "key man" policy covering an officer of the corporation who is now deceased. Attorney B appears as counsel of record for the life insurance company, a foreign corporation, defending on the basis of a suicide exclusion in the life insurance policy. At the trial of the action, Mr. C appeared as the corporate representative for the insurance company. Mr. C is an assistant general counsel for the insurance company. Although Mr. C is an attorney, he appeared at trial as a person having managerial responsibility on behalf of the defendant. Mr. C did not appear as counsel of record in the pending litigation and is not licensed in the State of North Carolina.

A jury verdict of suicide was returned in favor of the defendant insurance company. Attorney A filed a motion for JNOV or new trial.

Before the time for the defendant's response had expired, Attorney A attempted to contact Attorney B in order to enter into settlement negotiations. Attorney B's secretary advised Attorney A that Attorney B and his associate, who was also counsel of record in the action, were both on vacation. Attorney A then telephoned Mr. C directly, without the knowledge or consent of Attorney B or his associate. Attorney A advised Mr. C that both Attorney B and his associate were on vacation and asked whether he could speak directly with Mr. C, knowing Mr. C to be a lawyer with general counsel's office for the defendant insurance company. Mr. C agreed to talk directly with Attorney A, and an agreement to settle the lawsuit prior to post-trial motions was reached without the advice or input of Attorney B or his associate.

Did Attorney A act properly in contacting Mr. C without the knowledge or consent of the adverse corporate party's independent counsel of record?

**Opinion:**

No. Since Mr. C. participated at trial as a person having managerial responsibility, Rule 7.4(a) prohibited Attorney A from contacting him concerning the case without the consent of the corporation's counsel of record.

## RPC 129

January 15, 1993

[Editor's Note: This opinion was originally published as RPC 129 (Second Revision).]

### **Waiver of Appellate and Postconviction Rights in Plea Agreement**

*Opinion rules that prosecutors and defense attorneys may negotiate plea agreements in which appellate and postconviction rights are waived, except in regard to allegations of ineffective assistance of counsel or prosecutorial misconduct.*

**Inquiry:**

Attorney A represents Client C in regard to several serious federal criminal charges. In the process of plea negotiations, the government, through Government Attorney B, has offered to dismiss all but one of the charges in return for Client C's waiver of all appellate and postconviction remedies. Under the terms of the proposed agreement, the sentencing decision will be made by the court, after acceptance of the plea, in accordance with applicable federal sentencing guidelines.

May Attorney A and Government Attorney B ethically execute a plea agreement in which Client C's rights to appellate and postconviction review are waived?

**Opinion:**

Yes, except to the extent that the plea agreement purports to waive defendant's rights to appellate and postconviction remedies based on allegations of (a) ineffective assistance of counsel or (b) prosecutorial misconduct.

Whether a plea agreement is constitutional and otherwise lawful is a question to be determined by the courts. Whether the conduct of attorneys with respect to a plea agreement is ethical is a question addressed concurrently to the courts and the State Bar.<sup>1</sup>

As a general proposition, the execution of a lawful plea agreement by North Carolina attorneys does not appear to contravene the Rules of Professional Conduct. Indeed, the negotiation and execution of such an agreement by the prosecutor and defense attorney may well serve the administration of justice and, on balance, be in the best interest of the defendant. Rules 1.2(d) and 7.1(a) and (b).

Attorney A must recognize that, on occasion, waiver of appellate and postconviction rights may result in unreviewable error. Thus, Attorney A has a duty to explain to Client C the effect and possible consequences of the proposed plea agreement (including any inability to predict with confidence the sentence to be imposed or the likelihood of a sentencing error). Rule 6(b)(2). Having done so, Attorney A must abide by the client's decision concerning the plea agreement. Rule 7.1(c).

However, the waiver of rights arising from the ineffective assistance of counsel or prosecutorial misconduct appears to be, and shall prospectively be deemed to be, in conflict with the ethical duties expressed or implied in the rules. Under the rules, Attorney A has an obligation to represent Client C zealously and competently, and Government Attorney B has special responsibilities relating to his conduct in office. Rules 6, 7.1, and 7.3. Attorneys are expressly prohibited from making agreements prospectively limiting their liability for malpractice. Rule 5.8. Even if the plea agreement would not waive Client C's right to assert grievances against Attorney A or Government Attorney B or the right to sue Attorney A for malpractice, those sanctions may be hollow and ineffective remedies for the incarcerated Client C and insufficient to assure compliance with the rules. In the context of a criminal case, a logical and appropriate interpretation of the rules is a prohibition against agreements waiving the client's right to complain about an attorney's incompetent representation or misconduct. Moreover, an agreement waiving the right of Client C to complain about the conduct of either Attorney A or Government Attorney B may have the appearance or effect of serving the lawyer's own interests in contravention of Rule 5.1(b). In any event, the effective enforcement of the rules relating to the responsibilities of Attorney A and Government Attorney B requires that they not execute a plea agreement waiving appellate or postconviction rights or remedies based on allegations of ineffective assistance of counsel or prosecutorial misconduct.

**Footnote**

1. In the case of a direct conflict between the State Bar rules and the rules of the federal

court, the latter would prevail under the federal supremacy doctrine. The Rules of Professional Conduct have been adopted and incorporated by reference in the local rules of practice and procedure of the United States District Courts in this state. See Eastern District Rule 2.10, Middle District Rule 505 and Western District Rule 1(a).

## RPC 130

October 23, 1992

[Editor's Note: This opinion was originally published as RPC 130 (Revised).]

### **Employment of Board Member's Law Firm**

*Opinion rules that a law firm may accept employment on behalf of a governing board upon which its partner sits if such is otherwise lawful.*

**Inquiry:**

Lawyer L is a partner in Law Firm A, B & L. Other members of Law Firm A, B & L currently represent County C in several matters. Law Firm A, B & L expects to be employed by County C in regard to several other matters in the near future. Lawyer L has just been elected to County C's board of commissioners. In light of Lawyer L's new political office, can members of Law Firm A, B & L represent County C?

**Opinion:**

Yes. If an attorney or an employee of that attorney serves as a member of a county or municipal governing board, or state or federal legislative body or any entity thereunder, or committee thereof, it shall not be unethical for a partner, associate, or law firm of that attorney to represent such governing board, body, or entity provided the selection of the partner, associate, or law firm of that attorney is made with full disclosure of the relationship with the attorney board member and provided further that the attorney board member takes no part in the selection of the partner, associate, or law firm of that attorney for the representation of the governing board, body, or entity and the engagement is otherwise lawful. Reference is made, for example, to the prohibition and the exceptions thereto in G.S. 14-234. CPR 290 is overruled to the extent that it conflicts with this opinion.

## RPC 131

July 17, 1992

### **Representation of County While Suing Department of Social Services**

*Opinion rules that a lawyer employed to represent a county in appellate matters may also sue the county's department of social services.*

**Inquiry:**

Attorney A is retained by the county to represent the county with regard to matters in the appellate division of the general court of justice and tax issues associated with such appellate matters. Attorney A has not been employed to represent the county in any trial proceedings.

Attorney A has no responsibility of any kind with regard to social services cases.

Clients B and C have approached Attorney A and requested that he represent them in regard to their federal claim against the county's department of social services for an alleged violation of their civil rights.

May Attorney A represent Clients B and C against the county's department of social services?

#### **Opinion:**

Yes, with the consent of both the county and Clients B and C. Generally speaking, a lawyer may not sue his or her own client in another matter even though the subject causes of action are unrelated. Rule 5.1(a). In the instant situation, however, Attorney A might reasonably conclude that his or her representation of the county in its appellate matters would not necessarily be adversely affected by his or her prosecution of a claim against the county's department of social services on behalf of Clients B and C. If that is Attorney A's conclusion, and if both his or her current and prospective clients consent after full factual disclosure, there is no ethical impediment to Attorney A's acceptance of the case against the department of social services. See CPR 179.

## **RPC 132**

January 15, 1993

[Editor's Note: This opinion was originally published as RPC 132 (Revised).]

### **Communications with Government Officials**

*Opinion rules that a lawyer for a party adverse to the government may freely communicate with government officials concerning the matter until notified that the government is represented in the matter.*

#### **Inquiry #1:**

Citizen C received a loan from the city which loan was secured by a deed of trust against certain real property owned by Citizen C. Some time after obtaining the loan, Citizen C defaulted in making payments as specified in the note evidencing the obligation and was informed by the mortgage company servicing the loan that the city would proceed to foreclose if she failed to pay the arrearage owed on the loan. Citizen C then employed Lawyer L to represent her interests. Lawyer L wishes to contact a city employee who dealt with Citizen C in the origination of the loan to inquire as to whether the city would accept a deed in lieu of foreclosure. Lawyer L is aware that the city is generally represented by the city attorney who is a full-time salaried employee of the city. Under the circumstances may Lawyer L contact the city employee without the knowledge or consent of the city attorney?

#### **Opinion #1:**

Yes. This inquiry involves a matter in which there is no suggestion that Lawyer L has received notice of government lawyer participa-

tion in this particular matter; hence, the government employee to be contacted should not be deemed to be represented by another lawyer within the meaning of Rule 7.4(a) which provides:

During the course of his representation of a client, a lawyer shall not:

(a) Communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

If contact is made with the government employee, it is incumbent upon Lawyer L to fully disclose his representative capacity and to clearly state the reasons behind any request he might make on behalf of his client. So as to avoid any misunderstanding as to Lawyer L's role in the situation posited, Lawyer L should neither state nor in any manner imply that the city employee is cloaked with other than absolute discretion to respond or not to his communication. Rule 7.4(c).

#### **Inquiry #2:**

Attorney A was retained to represent Client W relative to her claim for employment discrimination against the city. Prior to bringing suit, Attorney A would like to write a letter to the city manager to determine whether the city would care to negotiate a settlement of the claim and, failing that, whether the city might volunteer information which might have a bearing upon the claim's merit. Attorney A is aware that the city is represented by the city attorney, a full-time salaried employee of the city. May Attorney A write a letter to the city manager for the stated purpose without the knowledge or consent of the city attorney?

#### **Opinion #2:**

Yes. As there is no indication that Attorney A has received notice of the city attorney's participation in this particular matter, the answer will be as in inquiry #1 above.

#### **Inquiry #3:**

Lawyer B has been employed to represent a former city employee concerning a grievance filed by the employee relative to his termination from city employment. While the grievance is pending, Lawyer B would like to telephone a member of the city council for the purpose of offering her views regarding the law pertaining to her client's situation, complaining that her client is being treated unfairly and unlawfully and urging that the council member intervene and have her client reinstated. Lawyer B is aware that the city is generally represented by the city attorney, a full-time salaried city employee. May Lawyer B communicate with the council member in the manner described without the knowledge or consent of the city attorney?

#### **Opinion #3:**

No. Assuming from the question that the elected city council member either has or might have some adjudicatory authority over the par-

ticular matter at issue, contact with the elected city council member constitutes *ex parte* communication within the meaning of Rule 7.10(b) which provides:

In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending except:

- (1) In the course of official proceedings in the cause.
- (2) In writing, if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer.
- (3) Orally, upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.
- (4) As otherwise authorized by law.

If the city council member neither has nor will have adjudicatory authority over the particular matter at issue and there has been no notice given to Lawyer B of active participation by the city attorney in this particular matter, contact with the elected city council member would be proper under the circumstances.

If contact is made with the city council member, it is incumbent upon Lawyer B to fully disclose his representative capacity and to clearly state the reasons behind any request he might make on behalf of his client. So as to avoid any misunderstanding as to Lawyer B's role in the situation posited, Lawyer B should neither state nor in any manner imply that the elected city council member is cloaked with other than absolute discretion to respond or not to his communication. Rule 7.4(c).

## **RPC 133**

July 17, 1992

### **Recycling Office Waste Paper**

*Opinion rules that a law firm may make its waste paper available for recycling.*

#### **Inquiry #1:**

What kind of guarantees must be obtained from a recycling company before a law office may give the company its waste paper products?

#### **Opinion #1:**

A lawyer has a professional obligation under Rule 4 of the Rules of Professional Conduct to protect confidential information in his or her possession from unauthorized disclosure. This obligation extends to the handling of waste paper products embodying confidential information generated in the ordinary course of legal business. However, this professional obligation does not generally compel any particular mode of trash handling or disposal. In particular there is no general requirement that waste paper which may evidence client confidences be shredded. It is sufficient in most cases for the responsible attorney to ascertain that those persons or entities responsible for the disposal of waste paper employ procedures which effec-

tively minimize the risk that confidential information might be disclosed. The responsible attorney should take particular care to ensure that custodial personnel under his or her direct supervision are conscious of the fact that confidential information may be present in waste paper products and are aware that the attorney's professional obligations require that there be no breach of confidentiality in regard to such information. So long as the attorney takes the precautions noted above, there is no reason why his or her law firm's waste paper products could not be made available for recycling.

#### **Inquiry #2:**

Do any of a law firm's waste paper products need to be shredded to comport with ethical considerations of client confidentiality?

#### **Opinion #2:**

A law firm will occasionally generate waste paper embodying confidential information which is so sensitive that the attorney's professional obligations under Rule 4 can only be satisfied by the paper's retention or its destruction. Under such circumstances shredding the waste paper would be appropriate.

### **RPC 134**

July 17, 1992

#### **Taking Assignment of Client's Judgment**

*Opinion rules that a lawyer may not accept an assignment of her client's judgment while representing the client on appeal of the judgment.*

#### **Inquiry:**

May a law firm take an assignment of a judgment in whole or in part as payment/security for fees rendered to a client while the law firm is representing that client in the active pursuit and appeal of the judgment and while representing the client in various other matters?

#### **Opinion:**

No. Rule 5.3(a) of the North Carolina Rules of Professional Conduct provides generally that, "A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, . . ." A lawyer's accepting an assignment of a judgment which is the subject of an appeal being handled by the lawyer would violate Rule 5.3(a). Generally speaking, a lawyer may not accept assignment of her client's judgment unless and until all appeals concerning the judgment have been exhausted and the client has determined not to pursue collection. Even under such circumstances, however, the practice of lawyers purchasing judgments from their own clients is not encouraged. CPR 291.

### **RPC 135**

July 17, 1992

#### **Advertisement of a Lawyer as the "Best"**

*Opinion rules that lawyers may not participate in a private lawyer referral service which advertises that its participants are "the best."*

#### **Inquiry:**

Law Firm ABC would like to participate in a private referral service doing business as "Consumer Connection." The referral service in question recruits participants from many different business and professional categories. Consumers desiring particular types of business and professional services are referred to participating entities when they call "Consumer Connection's" toll free number. The toll free number and information about the referral service are disseminated to consumers by means of television, radio, newspapers and direct mail advertising throughout eastern North Carolina. Promotional material made available to the Ethics Committee by the referral service indicates that "Consumer Connection" only represents "quality" businesses and that consumers "always get the best from Consumer Connection!" Although the promotional material indicates that "Consumer Connection is a locally owned and locally operated service . . .," it does not state that a list of all participating lawyers will be mailed free of charge to members of the public upon request or state that such information may be obtained. Further, it does not indicate that the service is not operated or endorsed by any public agency or disinterested organization.

May Law Firm ABC participate in the referral service as described?

#### **Opinion:**

No. Rule 2.2(c) of the Rules of Professional Conduct provides that a lawyer may participate in and share the cost of a private lawyer referral service only so long as certain specified conditions are met. Among the conditions are requirements that all advertisements of the service "state that a list of all participating lawyers will be mailed free of charge to members of the public upon request . . . and indicate that the service is not operated or endorsed by any agency or any disinterested organization." Rule 2.2(c)(5)(b) and (c). Since the promotional material advertising the referral service fails to include the required information, it would be inappropriate for a lawyer to participate in the referral service. Furthermore, the characterization of participating lawyers as "the best" would appear to be a misleading communication violative of Rule 2.1(c) in that it "constitutes a comparison of the participating lawyers' services with those of other lawyers" in a way which cannot be factually substantiated.

If the deficiencies noted above were remedied, there would appear to be no other impediment to a lawyer's participation in the referral service.

### **RPC 136**

July 17, 1992

#### **Attorneys as Notaries**

*Opinion rules that a lawyer may notarize documents which are to be used in legal proceedings in which the lawyer appears.*

#### **Inquiry:**

In light of the repeal of G.S. 47-8 which prohibited attorneys holding the office of notary public from administering "any oaths to a person to a paper writing to be used in any legal proceedings in which he appears as attorney," is there any ethical impediment to a lawyer's now acting as a notary public in that capacity?

#### **Opinion:**

No. In Ethics Opinion 354, decided under the former Canons of Ethics, the council generally ruled that an attorney acting as a notary public could notarize documents drawn by him in his capacity as an attorney. In subsequent Ethics Opinion 801, also decided under the Canons of Ethics, the scope of Ethics Opinion 354 was limited in recognition of then G.S. 47-8 and attorneys were ethically prohibited from administering oaths in regard to paper writings such as complaints, answers or affidavits which were to be used in legal proceedings in which the attorney appeared of record. Since the statute in question has since been repealed and there is no other compelling justification for the restriction, it is now permissible for an attorney to notarize documents for use in legal proceedings in which the attorney appears.

### **RPC 137**

October 23, 1992

#### **Estate Representation**

*Opinion rules that a lawyer who formerly represented an estate may not subsequently defend the former personal representative against a claim brought by the estate.*

#### **Inquiry:**

Mr. X was named by his grandmother in her will as executor of her estate. Mr. X qualified as the executor and began his duties. Thereafter he employed Attorney A to assist him in fulfilling his duties as executor. Attorney A assisted Mr. X in the preparation of a few of the probate filings and various miscellaneous matters.

Allegations of misconduct were informally made against Mr. X after he began his duties as executor. Attorney A received a telephone call from the husband of one of the heirs making general accusations against Mr. X, containing no specific facts or statements. Attorney A received no documentary evidence. The accusations were that Mr. X procured real estate from his grandmother while he was her attorney-in-fact. Attorney A related the accusations to Mr. X and asked him to explain. Mr. X did explain the transactions involved, and the physical evidence bore out his explanation that his grandmother signed a deed to him of her own free

will under no duress or influence. Attorney A continued to advise Mr. X with regard to his duties as executor.

Thereafter, a petition was filed to have Mr. X removed as executor of the estate. At the time of a hearing before the clerk of Superior Court, Mr. X resigned stating to the clerk that he was unable to conduct his duties in the face of disharmony and conflict with the heirs making those accusations. Mr. S was named as administrator C.T.A. and Mr. X turned over to Mr. S all of the estate's assets in his possession.

Thereafter Mr. S filed a civil action against Mr. X alleging breach of fiduciary duty and breach of contract. Mr. X asked Attorney A to defend him in the civil action. Attorney A undertook to do so. Various discovery requests were exchanged between the parties and Attorney A represented Mr. X in this aspect of the proceeding.

Subsequently, Mr. S, through his attorney, filed a petition in Superior Court to disqualify Attorney A as attorney representing Mr. X on the basis of conflict of interest.

May Attorney A continue representing Mr. X?

**Opinion:**

No. In accepting employment in regard to an estate, an attorney undertakes to represent the personal representative in his or her official capacity and the estate as an entity. Rule 5.1(d) of the Rules of Professional Conduct prohibits an attorney from representing any interest adverse to that of a former client in the same or substantially related matter without the former client's consent. In the subject action for breach of fiduciary duty and breach of contract, the interests of Attorney A's former client, the estate, are adverse to those of Mr. X. That being the case, Attorney A may not continue to represent Mr. X against the estate without the estate's consent.

## RPC 138

January 15, 1993

[Editor's Note: This opinion was originally published as RPC 138 (Revised).]

**Arbitration**

*Opinion rules that a partner of a lawyer who represents a party to an arbitration should not act as an arbitrator.*

**Inquiry:**

Client A entered into a contract for the sale of his business with Client B. The contract of sale contained an arbitration clause wherein it provided that should a dispute arise between A and B regarding any matter to be performed by A and B under the contract, that A should elect an arbitrator and B should elect an arbitrator and the two arbitrators should elect a third. Subsequent to the transfer and sale of the business, a genuine dispute arose between A and B, and Attorney X (on behalf of Client A) demanded arbitration and selected as an arbitrator Attorney O, who is not a member of Attorney X's law firm nor associated with him in any man-

ner. In response to the demand for arbitration, Attorney Y (for Client B) served notice on Attorney X that they selected Attorney P as their arbitrator. Attorney P is a partner in Attorney Y's law firm.

May Attorney P serve as an arbitrator?

**Opinion:**

No. In order to avoid even the appearance of impropriety, a lawyer should never undertake to serve as an arbitrator in a case in which his or her partner represents one of the parties to the arbitration. Canon IX.

## RPC 139

October 23, 1992

**Signing an Adoption Petition as an Accommodation**

*Opinion rules that a lawyer may not sign an adoption petition prepared by an adoption agency as an accommodation to that agency without undertaking professional responsibility for the adoption proceeding.*

**Inquiry:**

Attorney A regularly represents a private social services organization which places children for adoption. The social services organization would like to prepare and file adoption petitions on behalf of the prospective adoptive parents of children placed by the agency. Attorney A has been asked to sign those petitions as an accommodation to the social services organization with the understanding that he would not thereby assume any responsibility for the matters or actually undertake to represent the adoptive parents. May Attorney A sign the petitions under such circumstances?

**Opinion:**

No. An attorney who signs a pleading initiating a legal proceeding thereby makes an appearance in that proceeding and accepts responsibility for representation of the party on whose behalf he or she has appeared. It is therefore not possible for an attorney to sign a pleading as "an accommodation" without incurring the obligations of an attorney in the matter. If Attorney A is willing to accept responsibility for representing the adoptive parents, and they desire his services, he may sign and file adoption petitions prepared by the social services organization, provided that such petitions are prepared under his direct supervision. See Rule 3.1(a), Rule 3.3, RPC 29, and RPC 70.

## RPC 140

October 23, 1992

**Representation of Insured**

*Opinion finds no disqualifying conflict of interest where an attorney is retained by an insurer to represent an insured during the pendency of a declaratory judgment action relating to coverage in which the attorney is a nonparticipant.*

**Inquiry:**

Lawyer M was contacted by Insurance Company and asked to represent its insured, the Shady Rest Home, and its employee, Nurse N, who were named as defendants in a medical malpractice action brought by Plaintiff P. Lawyer M undertook the representation. Prior to filing responsive pleadings, Lawyer M received a communication from Attorney D, who advised Lawyer M that he, Attorney D, would be representing the Shady Rest Home and would be overseeing the litigation. Shortly thereafter Lawyer M received a telephone call from a representative of Insurance Company advising him that Insurance Company would neither defend nor indemnify Shady Rest Home and Nurse N because they were not named insureds in the subject policy. Insurance Company also notified Shady Rest Home directly of its position. Attorney D then contacted Lawyer M to ask that Lawyer M continue the defense of Shady Rest Home and Nurse N and advised that Shady Rest Home would continue paying for Lawyer M's services. Lawyer M agreed to continue.

Soon thereafter Lawyer M met the plaintiff's attorneys, Lawyers I and L, and informed them that a question of coverage had arisen and that Insurance Company had taken the position that it did not provide coverage for either defendant. Lawyer M indicated that Shady Rest Home could pay a small amount in settlement and further suggested that pursuit of the lawsuit would be fruitless because Shady Rest Home had no substantial assets. This effort to negotiate was unavailing.

In the meantime, Attorney D obtained information which caused Insurance Company to reconsider its position about coverage. Not long thereafter, Lawyer M was again contacted by a representative of Insurance Company and advised that Insurance Company had decided to provide a defense under a reservation of rights. Lawyer M was requested to provide Insurance Company with copies of his billings to Shady Rest Home so that the insurance company could reimburse Shady Rest Home and was further requested to bill Insurance Company in the future.

Subsequently, Lawyer M learned that Insurance Company filed a declaratory judgment action against Shady Rest Home, Nurse N and Plaintiff P to resolve the coverage question. In the meantime, Lawyer M continues to represent Shady Rest Home and Nurse N and has been paid for his services by the insurance company.

Lawyer M has represented only Shady Rest Home and Nurse N throughout the litigation. All information he has received has come through discovery, depositions and communications with Shady Rest Home and its employees. He has not been involved in the declaratory judgment litigation. Under the circumstances, may Lawyer M continue to represent Shady Rest Home and Nurse N?

### Opinion:

Yes. Nothing in the facts as stated discloses a disqualifying conflict of interest. Rule 5.1(b).

## RPC 141

October 23, 1992

### Contingent Fees and Structured Settlements

*Opinion rules that an attorney's contingent fee in a case resolved by a structured settlement should, if paid in a lump sum, be calculated in terms of the settlement's present value.*

#### Inquiry:

Client hired Lawyer to represent him concerning a medical malpractice claim and agreed to pay him 40% of the amount recovered. Lawyer negotiated a structured settlement which will pay Client a substantial amount of money in each of the next ten years. Are there any ethical considerations which would prevent Lawyer from collecting his entire fee immediately, rather than taking a percentage of each annual payment to the Client? If Lawyer may collect his entire fee immediately, is it proper for Lawyer to calculate his fee without discounting Client's settlement to present value?

#### Opinion:

Rule 2.6(a) provides that, "A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." Generally speaking, it is necessary to examine all relevant facts and circumstances relating to a fee and the legal services for which it is charged in order to make a determination as to whether it is "clearly excessive." For that reason the Ethics Committee has generally refrained from adopting *per se* rules prohibiting certain types of agreements or methods of computation. Nevertheless, the committee is of the opinion that where an attorney is entitled to receive a contingent fee calculated as a percentage of any amount recovered and arrangements are made for the payment of sums certain over a prolonged period of time in the form of a structured settlement, the attorney may collect immediately only the prescribed percentage of the total settlement reduced to its present value.

## RPC 142

January 15, 1993

### Lawyer as a Witness

*Opinion rules that a lawyer may not represent an estate in litigation against a claimant where the lawyer's testimony may be necessary to resolve the validity of the claim.*

#### Inquiry:

Mr. X, the father of Miss M, applied for life insurance in the amount of \$100,000 in 1985. Miss M contends that Mr. X intended for the proceeds of the policy to be used to educate Miss M who was then 13 years old. Mr. B, the uncle of Mr. X, was living with Mr. X when the policy was issued. Mr. B was shown as the pri-

mary beneficiary of the policy and Miss M was shown as the secondary beneficiary.

Mr. X died intestate on January 20, 1989. Mr. B hired Attorney A to represent his interests in regard to the estate of Mr. X. The insurance company paid Mr. B \$100,000. Mr. B subsequently invested some of the insurance proceeds and certificates of deposit in his own name. Shortly after the death of Mr. X, Lawyer L, on behalf of Mr. B, wrote a letter to Ms. W, the former wife of Mr. X and the mother of Miss M, in which Ms. W was asked to renounce any rights she might have to administer the estate of Mr. X. Thereafter Ms. W did renounce her right to administer the estate. She and Miss M contend that the renunciation was executed only after they had met with Lawyer L in his office and had been assured by Lawyer L that Mr. B would use the entire insurance proceeds to pay for Miss M's college and law school education. Lawyer L denies ever having offered such assurances to Ms. W and Miss M.

After the renunciation was filed, Mr. B was appointed administrator of Mr. X and employed Lawyer L to represent him in that capacity.

Mr. B died intestate on September 22, 1990, and his daughter, Ms. F, qualified as administratrix of his estate. Ms. F employed Lawyer L as attorney for the estate of Mr. B. The certificates of deposit mentioned above and perhaps other funds derived from the subject insurance proceeds became assets of the estate of Mr. B.

Sometime after Mr. B's death, Miss M and Ms. W were informed by Ms. F, either personally or through Lawyer L, that only \$25,000 from the estate of Mr. B would be paid toward Miss M's educational expenses.

On April 1, 1991, Miss M filed a claim against the estate of Mr. B for \$92,773.49. This claim was rejected on April 11, 1991, in a letter from Lawyer L.

Subsequently, Attorney A filed suit against the estate of Mr. B on behalf of Miss M seeking payment of Miss M's claim. Attorney A has requested that Lawyer L withdraw citing conflicts and the possibility that Lawyer L will be called upon to testify in the lawsuit. Lawyer L has refused to withdraw.

May Lawyer L continue representing the estate of Mr. B in the defense of the lawsuit brought by Miss M?

#### Opinion:

No. At issue in the lawsuit will almost certainly be Mr. B's understanding of why Mr. X purchased life insurance, how Mr. B came to be named as the primary beneficiary and what assurances, if any, were offered to Ms. W and Miss M by Lawyer L in conjunction of the renunciation of Ms. W's right to administer Mr. X's estate. The testimony of Lawyer L will be necessary to the resolution of these questions. In particular, only Lawyer L is in a position to deny the contentions of Ms. W and Miss M that it was affirmatively represented to them by Lawyer L that in consideration for Ms. W's renuncia-

tion, the proceeds of the life insurance would be used to pay for Miss M's education. Rule 5.2(a) of the Rules of Professional Conduct provides that "a lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he . . . ought to be called as a witness . . ." None of the exceptions to the general rule appear to be applicable in this case. Since it appears that it will be necessary for Lawyer L to testify, he is disqualified from representing the estate in a litigation.

## RPC 143

October 29, 1993

[Editor's Note: This opinion was originally published as RPC 143 (Second Revision).]

### City Council Member as Client

*Opinion rules that a lawyer who represents or has represented a member of the city council may represent another client before the council.*

#### Inquiry:

Attorney A represents X, a dairy farmer, whose entire property (including the milking machines but not the cows) is being condemned for a new airport by the city. Attorney A also represents Y, a landowner whose real estate was condemned in 1968 for the express purpose, as stated in the petition, of extending the runway and relocating state highway and public utility lines and other alleged matters of then public convenience and necessity concerning the old airport, which purposes were never undertaken.

The city recently had an election in which none of the incumbent council members who favored the new airport were reelected.

Mr. B who received about 70% of the vote to unseat an incumbent has now been scheduled for a hearing concerning his residency under NCGS 163-282 and NCGS 163-57.

Attorney A has been asked to consider appearing before the county board of elections on behalf of Mr. B.

Is it ethical for Attorney A to represent Mr. B concerning his residency when Attorney A has two legal matters pending involving the city which might come before Mr. B as one of six regularly voting members of the city council? Will Mr. B have to disqualify himself? If Attorney A handles some of Mr. B's real estate matters, can he appear before the city council or otherwise contact the city or its employees?

#### Opinion:

It is ethical for a lawyer to represent persons before an elected or appointed governing body following or during representation of a member of the governing body so long as the lawyer does not use his relationship to the member of the governing body to obtain favorable decisions from the body. Rule 1.2(d). The lawyer should also take care not to suggest that he has the ability to improperly influence the body on account of his representation of the member.

Rule 1.2(e).

## RPC 144

January 15, 1993

### Conflict in Joint Representation

*Opinion rules that a lawyer, having undertaken to represent two clients in the same matter, may not thereafter represent one against the other in the event their interests become adverse without the consent of the other.*

#### Inquiry #1:

Attorney A drew a will. The will set up a "family trust" which will invest the corpus of the estate. The "family trustee" who invests the corpus is obligated to pay a set amount to a separate "charitable trust" established by the will. The charitable trust directs that all monies coming from the family trustee shall be disbursed for charitable uses. After ten years of charitable payments, the charitable trustee is to distribute its balance to charitable purposes and family trustee is to distribute the remaining principal and accumulated interest to testator's family. The family trustee has no discretion as to the amount of money to be distributed to the charitable trust. Attorney A currently represents the executor of the estate whose duty is to pay estate debts and to deposit all sums remaining into the family trust. Attorney A would also like to represent the charitable trust and the family trust. In the absence of any failure of the family trustee to pay the mandated amount to the charitable trust, may Attorney A represent the charitable trust, the family trust and the executor?

#### Opinion #1:

Yes. Based upon the facts presented, there is no disqualifying conflict of interest present among the executor, the family trust, and the charitable trust. Rule 5.1(b). Obviously if the family trust failed to pay the required amount to the charitable trust, an unwaivable conflict of interest would develop between those entities, and Attorney A could not continue to represent both.

#### Inquiry #2:

If Attorney A undertakes to represent both the family trust and the charitable trust, and the family trust fails to distribute the amounts mandated to the charitable trust, may Attorney A cease to represent the family trust and represent the charitable trust in a suit to mandate distribution to the charitable trust from the family trust?

#### Opinion #2:

Yes, if the family trust consents. In the event that the family trust fails to distribute the required amounts to the charitable trust, there would be an irreconcilable conflict of interest between those two clients, and Attorney A would be required to withdraw from the representation of one or the other of the trusts. Rule 5.1(b). If Attorney A chooses to withdraw from representation of the family trust, the family trust then becomes Attorney A's former client. Rule 5.1(d) prohibits a lawyer from representing an interest adverse to that of a former

client in the same or substantially related matter without the former client's consent. Since the matters involved are substantially related, it follows that Attorney A may not represent the charitable trust in an action adverse to the interest of her former client, the family trust, without the consent of the family trust. In determining whether to ask for such consent, Attorney A should be mindful of language contained in the comment of Rule 4 which declares that a lawyer cannot properly ask for consent when a disinterested lawyer would conclude that the client should not consent under the circumstances. In this case the family trust should not be asked to consent if Attorney A's continuing representation of the charitable trust will require the use of confidential information of the family trust.

## RPC 145

January 15, 1993

### Lawyer Approval of Settlement

*Opinion rules that a lawyer may not include language in an employment agreement that divests the client of her exclusive authority to settle a civil case.*

#### Inquiry:

I write to request an opinion from the North Carolina State Bar regarding the following language which I contemplate inserting in my employment agreements for contingency fee cases:

"No settlement of my claim shall be made without the consent of both me and my attorney."

"I have read this contract and understand it, agree, and sign it of my own free will."

Clearly, through this language the client contracts to waive his exclusive right to settle the case. Would this allow me to refuse to settle the case for a given amount, and, if need be, try the case if I thought an offer the client was willing to accept was less than the settlement value of the case; or would the use of this language violate Canon VII and Rule 7.1 of the Rules of Professional Conduct? What language, if any, do you suggest I insert in an employment agreement that would assist me in resolving a situation where the client and I disagree on the value of a settlement offer?

#### Opinion

Rule 7.1(c)(1) provides that a lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. Therefore, a lawyer cannot divest a client of his exclusive authority to settle his case.

There is no ethical impropriety in having the sentence, "I have read this contract and understand it, agree, and sign it of my own free will," in the retainer agreement.

## RPC 146

January 15, 1993

### Invitations to Law Firm's Hospitality Suite

*Opinion rules that a law firm can invite existing clients to a social function hosted by the law firm prior to a bid letting for contracts. Opinion further rules that the law firm may host a social function for nonclients who attend the bid letting as long as the law firm does not solicit employment from nonclients.*

#### Inquiry #1:

The North Carolina Department of Transportation awards contracts on a monthly basis. Many contractors and subcontractors occupy rooms at the North Raleigh Hilton the evening prior to such letting.

Law Firm A is interested in hosting a hospitality suite at the North Raleigh Hilton the evening before such letting. Law Firm A wants to invite its existing clients which may be in attendance as well as other contractors who are not existing clients.

#### Opinion #1:

Yes. The law firm may host a hospitality suite at the site of the bid letting for those persons or firms that are existing clients of the law firm. Rule 2.4 does not prohibit a lawyer's contact with existing clients.

#### Inquiry #2:

May Law Firm A send an invitation to nonclient contractors it knows will be attending?

#### Opinion #2:

Yes. Law Firm A may send an invitation to nonclient contractors it knows will be attending the bid letting as long as Law Firm A does not solicit business from the nonclients who come to the hospitality suite. Rule 2.4(a) of the Rules of Professional Conduct prohibits a lawyer's in-person or live telephone solicitation for professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. Assuming that the hospitality suite function is a means of promoting good will, which could lead to employment of Law Firm A by the nonclients, Law Firm A could invite nonclient contractors. Again, members of Law Firm A must be very careful to avoid solicitation of professional employment from the nonclient contractors who come to the hospitality suite.

## RPC 147

January 15, 1993

### Percentage Bonuses for Paralegals

*Opinion holds that an attorney may not pay a percentage of fees to a paralegal as a bonus.*

#### Inquiry:

A law firm employed an experienced certified legal assistant who worked exclusively in the area of real estate for many years. The legal assistant, under the supervision of the attorneys in

the firm, participates in all phases of real estate practice: searching titles, preparing deeds, closing papers, and foreclosure documents.

The firm pays the legal assistant a regular salary which is supplemented by periodic bonuses. The bonuses are discretionary with the firm's partners, but are generally related to the profitability of the firm's real estate practice.

The firm wishes to implement a system of performance-based incentives for its employees. It proposes to supplement the legal assistant's salary with monthly bonuses calculated on the firm's net income from the real estate closings which the legal assistant has worked on. Each bonus would be equal to a small percentage (approximately five percent) of the compensation which the firm received for real estate services in which the assistant has participated during that month.

May the firm pay such bonuses without violating Rule 3.2, or any other provision, of the Rules of Professional Conduct if:

a) The bonuses, and the means for calculating them, are made an express part of the legal assistant's employment contract; or

b) The bonuses remain discretionary and the same method of calculating them is used for purposes of guidance only?

#### **Opinion:**

While bonuses for productivity are not prohibited, the firm may not pay the bonuses to its paralegal under either alternative set out in the inquiry without violating Rule 3.2 of the Rules of Professional Conduct. That rule prohibits attorneys from sharing legal fees with nonlawyers, except in certain circumstances not relevant to this inquiry. It is apparent from the inquiry that the paralegal's bonuses would be calculated based upon a percentage of the income the firm derives from legal matters on which the paralegal has worked. This plan in effect pays the paralegal a percentage of the legal fees received by the firm and therefore falls squarely within the prohibition of Rule 3.2. The proposed method of calculation violates Rule 3.2 regardless of whether the bonuses are made part of the paralegal's employment contract or whether they are paid at irregular intervals at the discretion of the partners in the firm. See CPR 289.

### **RPC 148**

January 15, 1993

#### **Division of Fees**

*Opinion holds that a lawyer may not split a fee with another lawyer who does not practice in her law firm unless the division is based upon the work done by each lawyer or the client consents in writing, the fee is reasonable, and responsibility is joint.*

#### **Inquiry #1:**

Attorney A and Attorney B do not practice in the same firm. Attorney A refers a case to Attorney B because the nature of the case involves matters not normally handled by Attorney A but

within the area of practice of Attorney B (IRS estate tax matter). There is no written or oral agreement between the attorneys or with the client concerning a division of fees before, during, or after the relationship (there has never been any written or oral agreement of fee sharing between Attorney A and Attorney B in any past relationship); the client is not advised of any joint representation and the work is performed by Attorney B.

After a fee is received by Attorney B, Attorney A contacts Attorney B asking that one-third of the fee be shared with Attorney A in accordance with a practice which Attorney A has with other attorneys. Attorney B has not had any prior arrangement with Attorney A or any other attorney concerning such a fee splitting, and Attorney B is primarily concerned about the ethical implications of such a fee splitting arrangement given the following additional facts:

In the course of his representation, Attorney B had to make a disclosure to a government agency (IRS) concerning his fee which was signed under penalty of perjury. The disclosure was necessary in order to obtain a benefit (tax deduction) for his client. Attorney B is now concerned that any fee splitting arrangement entered into between the parties after a resolution of the case may jeopardize the estate's deduction previously obtained for the client. Attorney B has disclosed this to the client who has denied permission for a fee split because of the potential problems that such a reopening could have on the estate. Attorney A believes there is no ethical conflict with his receiving a one-third fee for his referral.

May Attorney B ethically fee split any portion of the fee with Attorney A?

#### **Opinion #1:**

Attorney B may not split any portion of the fee with Attorney A. Rule 2.6(d) provides that attorneys not in the same law firm may split fees only if the division is in proportion to the work done by each lawyer or if the client agrees to the division in writing, each lawyer assumes joint responsibility for the representation, and the total fee is reasonable. The inquiry makes it clear that Attorney A has not done any work on the matter and that the client has not agreed to the fee splitting arrangement. Consequently, a division of the fee would violate Rule 2.6(d). Additionally, it appears that, in light of the situation with the IRS, that any fee splitting arrangement might prejudice the client, in violation of Rule 7.1(a)(3).

#### **Inquiry #2:**

Would the answer to question 1 above be different if the additional facts above were not in existence?

#### **Opinion #2:**

No. The fee splitting proposal would still violate Rule 2.6(d).

### **RPC 149**

January 15, 1993

#### **Unclaimed Client Funds**

*Opinion rules that an attorney may not donate a client's funds to a charity without the client's consent.*

#### **Inquiry #1:**

When Attorney A undertakes to represent a client in regard to a traffic ticket, Attorney A tries to estimate the fines and costs and have the client pay that amount in advance. Sometimes the client is owed a refund. Attorney A sends a trust account check for the refund together with a receipt from the court. Sometimes the client never cashes the check and it stays on the books. After a certain period of time has elapsed, may the attorney stop payment on the check and contribute the money to a charity in the client's name but without the client's consent?

#### **Opinion #1:**

No. Since the attorney knows the identity of the client and presumably has a recent address for the client from the traffic ticket, the attorney should make every effort possible to get the client to cash the trust account check. Nothing else can be done with the client's money, without the client's consent, except escheating it to the treasurer pursuant to G.S. 116B as prescribed by Rule 10.2(H)(3)(a). G.S. 116B-31.5 provides a method for voluntary early delivery of funds to the treasurer under certain circumstances. See RPC 89.

#### **Inquiry #2:**

Attorney A is considering writing clients that the total costs of the citation will be a certain amount payable in advance, that any fines and costs will be paid out of that in full and that the balance will be his fee. Would that be ethical? Is there any better way to handle this problem?

#### **Opinion #2:**

No. A lawyer shall not enter into a contingent fee arrangement for representing a defendant in a criminal case. A contingent fee is one which is dependent on the outcome of the matter for which service is rendered. Further, a lawyer shall not acquire a proprietary interest in the subject matter of litigation he is conducting for a client. Rule 5.3(a). The lawyer may collect a fixed fee in advance and an amount estimated for the fines and costs, but the client must remain ultimately responsible for the actual expenses. Rule 2.6(c). See RPC 76.

### **RPC 150**

January 15, 1993

#### **Linking Trust and Business Accounts**

*Opinion rules that an attorney cannot permit the bank to link her trust and business accounts for the purpose of determining interest earned or charges assessed if such an arrangement causes the attorney to use client funds from the*

trust account to offset service charges assessed on the business account.

#### **Inquiry:**

Attorney A maintains a trust account and a business account with Sunshine Bank. Attorney A has been a participant in IOLTA. Over the last several months, however, Attorney A's account has been incurring substantial charges (over \$400 in the last year).

After repeated inquiries Attorney A discovered that her business account and trust account were "linked" for the purposes of determining interest earned or charges assessed. Both accounts are subject to a charge per deposit or check, and interest accrues on daily balances such that a substantial balance in the account should offset the check and deposit charges.

Since Attorney A had repeatedly instructed the bank not to debit the trust account for charges, intending to avoid charges for new checks, etc., the bank had linked the two accounts so that the charges from the trust account were assessed against the business account. Of course, being a member of IOLTA the interest on the trust account balance, which would otherwise have offset the charges, was sent to IOLTA. In effect, Attorney A was paying for contributions to IOLTA. Being deprived of the offsetting interest on the trust account, the numerous checks she wrote for real estate conveyances created a considerable debit.

At this point the bank has changed both accounts to commercial accounts which do not draw interest, but the balances in the accounts create "credits" which offset the charges per check or deposit. Any negative balance on the trust account is shifted over to the business account.

Does this situation create any ethical problems? Neither account will ever yield a credit in the form of interest income, and hopefully the ongoing balances will offset the debit charges such that they will usually be "free" accounts.

#### **Opinion:**

Yes. Under Rules 10.1 and 10.3, client funds in a trust account may not be used to pay bank service charges or fees of the bank because such funds are the sole property of the client and cannot benefit the attorney. Rules 10.1 and 10.3 do permit the payment of bank service charges and fees of the bank from interest earned on client funds deposited in the lawyer's trust account. The new arrangement established by Attorney A's bank could create ethical problems if the credits and service charges to the trust and business accounts were not accounted for independently. Since the trust and business accounts are "linked" for the purposes of determining interest earned or charges assessed, it would be impossible for one to separate out the specific amount of interest earned or charges assessed for either account. If for a particular statement period the trust account earned more "credits" than it was assessed charges, while the

business account was assessed more service charges than it earned "credits", the trust account "credits" could offset the service charges assessed on the business account. Rule 10.1 does not permit the lawyer to use client funds from the trust account ("credits" from the trust account) for the lawyer's personal benefit (the offset of service charges assessed on the business account).

### **RPC 151**

July 9, 1993

[Editor's Note: This opinion was originally published as RPC 151 (Revised).]

#### **Representation of Insured and Insurer**

*Opinion discusses when an attorney who is a full-time employee of an insurance company may represent the insurance company, the insured, or others respecting various matters of interest to the insurance company.*

Note: The following inquiries were submitted to seek a clarification of CPR 326 (adopted January 14, 1983) which reconsidered opinion 682 (1969) and CPR 19 (1974).

#### **Inquiry #1:**

May an attorney who is a full-time salaried employee of insurance company A appear as attorney of record on behalf of insurance company A in a declaratory judgment action brought by insurance company A?

#### **Opinion #1:**

CPR 326 (1983) was reviewed by the North Carolina Supreme Court in *Gardner v. N.C. State Bar*, 316 N.C. 285, 341 S.E.2d 517 (1986). The North Carolina Supreme Court held that a licensed attorney who is a full-time employee of an insurance company may not ethically represent one of the company's insureds as counsel of record in an action brought by a third party for a claim covered by the insurance policy. 316 N.C. at 286. The court also held that the attorney could not properly appear as counsel of record for the insured in the prosecution of a subrogation claim for property damage. *Id.* The insurance company is not a named party in either the third party action or the subrogation claim and in both cases, the insured is the real party in interest. Thus, an insurance company attorney who appears under these circumstances is acting for the insured not the company, in violation of N.C. Gen. Stat. Section 84-5, which forbids corporations to engage in the practice of law or to represent a person in court. 316 N.C. at 291.

Where an insurance company brings a declaratory judgment action, the company is a named party to the action. A staff attorney for the company may appear as attorney of record for the insurance company in such a situation without running afoul of G.S. 84-5.

#### **Inquiry #2:**

May a staff attorney employed full time by an insurance company appear as attorney of record on behalf of the insurance company in a declara-

tory judgment action filed against it by its insured or another insurance carrier?

#### **Opinion #2:**

Yes, so long as the staff attorney represents the insurance company and not its insured. See answer to Inquiry #1.

#### **Inquiry #3:**

In a declaratory judgment action which names both insurance company A and the policyholder, may a staff attorney who is a full-time salaried employee of insurance company A represent both insurance company A and the policyholder if the interests of the policyholder and the insurance carrier are identical?

#### **Opinion #3:**

No. CPR 326 noted that the attorney's paramount responsibility is to the court and client which he serves before the court. This responsibility should not be influenced by any other entity. When an attorney, who is employed by a corporation, is directed by his employer in the representation of other individual litigants, he is subject to the direct control of his employer, which is not itself the litigant and which is not itself subject to professional discipline as an officer of the court. This diluted responsibility to the court and the client must be avoided.

The conflict perceived by the ethics committee is thus as much a function of the relationship of the insurance company, in-house counsel and the insured as the actual difference in their interests in the particular litigation. Even where, as in this inquiry, the insurance company and the insured have similar interests in the lawsuit, the problem of the "diluted responsibility" to the client created by the introduction of a corporate entity into the legal relationship will continue to exist.

#### **Inquiry #4:**

May a staff attorney who is a full-time salaried employee of insurance company A appear as attorney of record before the North Carolina Industrial Commission on behalf of insurance company A and its insured, the employer?

#### **Opinion #4:**

No. The interests of the insurance company and its insured in such an action conflict, in violation of Rule 5.1 of the Rules of Professional Conduct. See also answer to Inquiry #3.

#### **Inquiry #5:**

A claim has been submitted to insurance company A. The claimant's attorney and insurance company A's representative have agreed to refer the claim to voluntary binding arbitration.

There is a high/low agreement which prescribes the perimeters of possible arbitration awards, and the high is within the insured's policy limits. In this situation may an attorney who is a full-time salaried employee of insurance company A appear at a live hearing of the arbitration to represent the insurance company's interest in this claim which has been made against its insured's policy and to argue the matter before the arbitrator?

#### **Opinion #5:**

No. The insured, not the insurance company, is the real party in interest in such an arbitration proceeding. "If an insurance company, through its employees, appears for an insured, it would be appearing as an attorney for someone else. The company itself is not the party to the action. The insured is the one who is named." *Gardner v. N.C. State Bar*, 316 N.C. 285, 291 (1986). Consequently, the insurance company would violate G.S. 84-5 by appearing through its in-house counsel at the proceeding. Independent outside counsel should be hired to appear for the insured. The fact that the arbitration award will be within the insured's policy limits does not completely negate the intrusion on the attorney's professional independent judgment created by the in-house attorney's relationship with the employer/insurance company.

#### **Inquiry #6:**

Under the same fact situation as Inquiry #5, if the arbitration were conducted through documents procedure only without a live hearing, may the staff attorney for the insurance company appear as attorney of record in the name of its insured to protect the insurance company's interest?

#### **Opinion #6:**

No. See response to Inquiry #5. The insurance company would still be practicing law for another, in violation of G.S. 84-5 even though its activities would be restricted to the preparation and submission of documents.

#### **Inquiry #7:**

May a staff attorney employed full time by an insurance company take an examination under oath of its insured who is pursuing a first party claim under the insured's insurance policy?

#### **Opinion #7:**

Yes, so long as the in-house attorney is acting only for the insurance company in the proceeding.

#### **Inquiry #8:**

May a staff attorney employed full time by an insurance company appear as attorney of record on behalf of and in the name of the company and pursue a claim against its insured?

#### **Opinion #8:**

Yes. There is no conflict of interest or infringement of the staff attorney's professional judgment while the company is pursuing a claim against the insured for the company. The company has a primary interest in the claim and may represent itself respecting such claim without running afoul of G.S. 84-5.

#### **Inquiry #9:**

May a staff attorney employed full time by an insurance company appear as attorney of record on behalf of the company and pursue a subrogation claim on behalf of the company joining with its insured as a coplaintiff against a third party who is liable for damages to the insured?

#### **Opinion #9:**

No. In pursuing the subrogation claim on behalf of the company with the insured as coplain-

tiff, the insurance company attorney would be required to make decisions respecting the rights of the insured, in violation of G.S. 84-5. Such a situation also creates a potential conflict of interest in violation of Rule 5.1.

#### **Inquiry #10:**

May a staff attorney employed full time by an insurance company appear as attorney of record for the company in a hit-and-run suit brought against the name of the insurance company or brought against an unknown defendant designated as "John Doe"?

#### **Opinion #10:**

Yes. In this case, it appears that the insurance company is the real party in interest and may be subject to liability apart from the insured's liability. Consequently, the insurance company may represent itself without violating G.S. 84-5.

#### **Inquiry #11:**

May a staff attorney employed full time by an insurance company appear as attorney of record for the company, but making that appearance in the name of an uninsured tort-feasor if the company's insured is pursuing an uninsured motorist claim? Assume for the sake of this inquiry that the insurance company has waived its subrogation rights.

#### **Opinion #11:**

No. Although G.S. 20-279.21(b)(3) in the uninsured motorist setting and G.S. 20-279.21(b)(4) in the underinsured motorist setting permit the insurance carrier to appear in defense of the claim although not named in the caption or named as a party, "anonymously" defending the lawsuit brought against the tort-feasor logically requires defense counsel to seem to be appearing on behalf of the tort-feasor. To do so constitutes practicing law, as that term is defined in G.S. 84-2.1, on behalf of another. The corporate insurer through its employees cannot practice law and appear on behalf of others under G.S. 84-5 as interpreted by the court in *Gardner v. N.C. State Bar*, supra.

#### **Inquiry #11(a):**

Same facts as Inquiry #11 except in this situation assume that the insurance company does not waive its subrogation rights.

#### **Opinion #11(a):**

No. See response to Inquiry #11.

#### **Inquiry #12:**

Same facts as Inquiry #11 except in this situation the staff attorney is representing the insurance company's interest in the name of an underinsured tort-feasor instead of in the name of an uninsured tort-feasor.

#### **Opinion #12:**

No. See response to Inquiry #11.

#### **Inquiry #13:**

Same inquiry as Inquiry #12 above; however, assume the insurance carrier is not willing to waive its subrogation rights.

#### **Opinion #13:**

No. See response to Inquiry #11.

#### **Inquiry #14:**

May a full-time salaried staff attorney of an insurance company appear for the company and file an interpleader action seeking court's approval for the allocation of settlement proceeds in a liability claim situation?

#### **Opinion #14:**

Yes, provided that the insurance company is a real party in interest and has rights which would be affected by the allocation of the settlement proceeds. The attorney could not properly represent the insured in this situation, however.

### **RPC 152**

January 15, 1993

#### **Disclosure of Material Terms of Plea Agreements**

*Opinion rules that the prosecutor and the defense attorney must see that all material terms of a negotiated plea are disclosed in response to direct questions concerning such matters when pleas are entered in open court.*

#### **Inquiry #1:**

A prosecutor and defense attorney discuss the circumstances under which a defendant in a pending criminal case will plead guilty. It is tentatively agreed that the defendant will plead guilty to a lesser included offense as to one charge and that another unrelated charge will be dismissed. After discussion with counsel, defendant accepts the plea arrangement.

A transcript of plea is prepared which does not refer to the charge that is to be dismissed. Further, the transcript, as prepared, does not state that the defendant has agreed to plead as part of a plea arrangement.

When the plea is actually entered and accepted by the presiding judge, the defendant, under oath, states that there is no plea agreement. Neither the prosecutor nor defense counsel inform the judge about the earlier plea discussion or that in return for the plea of guilty, the defendant is being allowed to plead guilty to a lesser included offense and that another unrelated charge is to be dismissed as a result of the plea.

Under the above recited factual situation, would the conduct of all counsel be consistent with the Rules of Professional Conduct?

#### **Opinion #1:**

No. Rule 1.2(c) of the Rules of Professional Conduct prohibits attorneys from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. From the facts presented, it is clear that the client's guilty plea was the product of a negotiated plea arrangement. The client's untruthful answers to questions relating to the subject plea agreement and the lawyer's signature on the transcript, misrepresent the plea arrangement and thus are in violation of Rule 1.2(c). Additionally, Rules 7.2(a)(5) and (8) prohibit an attorney from knowingly using perjured testimony or false evidence and from counseling or assisting his client in conduct that the lawyer knows to be fraudulent.

### **Inquiry #2:**

Assume a similar factual situation where the prosecutor agrees to tell the judge in open court before sentencing that the state is not opposed to a probationary sentence in return for the defendant's guilty plea, the transcript of plea states that the defendant has not agreed to plead as part of a plea agreement, when the plea is accepted by the trial court, the defendant, under oath, states there is no plea agreement and the judge is again unaware of the plea negotiations.

### **Opinion #2:**

No. See opinion #1.

### **Inquiry #3:**

Assume a similar factual situation where the plea negotiation takes place between a lay administrative assistant of the district attorney and defense counsel. Assume further that the administrative assistant has not discussed the case beforehand with the district attorney or the assistant district attorney assigned to the case, but that the district attorney and his assistants are aware that the lay administrative assistant engages in such practice as a routine matter and that the district attorney has not disapproved of such practice.

### **Opinion #3:**

Even though the district attorney may not directly participate in or become familiar with particular cases in which plea negotiations have been undertaken on his behalf by the administrative assistant, he or she is professionally responsible for the conduct described in the preceding inquiry to the extent that he or she has knowingly ratified the practice by acquiescence. Rule 3.3(c)(1) makes a lawyer professionally responsible for any conduct of a nonlawyer under his or her supervision which would violate the Rules of Professional Conduct if engaged in by a lawyer if the supervising lawyer "orders or, with the knowledge of specific conduct, ratifies the conduct involved . . ." Since the above described practice is described as being "routine" and the district attorney is aware of the conduct, such conduct would be inconsistent with the requirements of Rule 3.3(c)(1).

## **RPC 153**

January 15, 1993

### **Termination of Joint Representation: The Former Client's Right to the File**

*Opinion rules that in cases of multiple representation a lawyer who has been discharged by one client must deliver to that client as part of that client's file information entrusted to the lawyer by the other client.*

### **Inquiry:**

Minor Plaintiff was injured during a surgical procedure at Hospital. Nurse anesthetist, a hospital employee, participated actively in the surgery, along with several others. Due to the focus of the early investigation by the hospital, Nurse independently sought an attorney to represent her interests and selected Attorney A,

who was in private practice and who coincidentally generally represented Hospital and the liability insurance carrier for the hospital and the nurse, as a hospital employee. At the same time Nurse was represented by Attorney B, who was in charge of Hospital's legal department, and who held himself out to Nurse as her attorney during investigation of the occurrence and in protecting her in the event of a lawsuit that was felt to be "imminent." Before undertaking representation of Nurse, Attorney A obtained approval of Attorney B and his office on behalf of Hospital and the liability insurance carrier. After Attorney A, Attorney B on behalf of Hospital, and the insurance company determined that the interests of Nurse and Hospital were the "same," they agreed to the joint representation of Nurse and Hospital and undertook investigation and management of the case, which continued for some time. Despite recognition by Attorneys A and B from the outset that reports of the incident by various participants differed, no disclosure was made of potential conflicts of interest existing at the time or that might arise later, and no attempt was made to limit the representation or sharing of information. During the period of joint representation of Nurse and Hospital, substantial information concerning the incident was gathered and placed in the file(s) maintained concerning the joint representation by both Attorneys A and B. Among the items contained in the files were statements obtained from individuals participating in the surgery by persons in Hospital's risk management department, a division of Hospital's legal department, headed by Attorney B. The files also contained hospital records of the injured party, which were furnished by Hospital. Nurse became aware of a "proposed statement" of facts concerning the occurrence, which was proposed by Attorney A as a report to be given to the injured minor's family, and, in her opinion, erroneously focused blame on her. Nurse had not participated in formulation of this statement and had not authorized it. Nurse requested a copy of the file from Attorney A for her review and use and asked if her interests were being protected. Nurse did not receive the file and did not receive answers satisfactory to her. Nurse then consulted Attorney X, who undertook to represent Nurse. Attorney X contacted Attorney A and requested a copy of all materials in the files relating to the representation of Nurse in order to assist in properly representing Nurse. Attorney A, on instructions from Attorney B for Hospital, refused to surrender statements that were given him by Hospital's risk management department, claiming that such materials are privileged as having been obtained in anticipation of litigation or trial. Attorney A also refused to surrender a copy of hospital records of the injured party claiming that those records are also privileged.

Under the circumstances, do Attorneys A and B have an ethical obligation to surrender the

contents of the file(s) to Nurse and her new Attorney X?

### **Opinion:**

Yes, otherwise irreparable harm could be done to a client needing the accumulated information to assist her defense. Rule 5.1 makes loyalty an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation and comply with Rule 2.8. Rule 2.8(a)(2) obligates a lawyer whose employment has been terminated to surrender to the former client those portions of the file to which the client is entitled. Loyalty to a client is impaired when a lawyer cannot 1) represent the client zealously under Rule 7.1 and avoid prejudicing or damaging the client during the course of the professional relationship (Rule 7.1(3)), and 2) when the lawyer cannot keep the client reasonably informed or promptly comply with reasonable requests for information (Rule 6(b)(1)). When a lawyer undertakes representation of codefendants, an impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony or incompatibility of positions. Identifying and resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation and not the client's responsibility. Once Attorneys A and B determined that Nurse's and Hospital's interests were the same and, presumably, that no conflict of interest existed and then undertook joint representation of nurse and hospital, with the consent of hospital and its insurance company, information gathered on behalf of Nurse and Hospital (who were deemed to have the "same interest") lost its confidential nature as between Nurse and Hospital by implied authorization, if not actual consent, under Rule 4(c)(1) and (2). Since Nurse relied on reasonable attorney-client expectations of protection of her interests and access to information, Attorneys A and B are now estopped to negate consent to the rights inuring to Nurse's benefit from the joint representation. Nurse is entitled to immediate possession of all information in the joint representation file or files of Attorneys A and B accumulated to the date of termination of representation, that would or could be of some value to her in protecting her interests. This includes the items specified in the inquiry and any others that would or could be of some help to Nurse. The information must be surrendered unconditionally by Attorneys A and B without regard to whether the cost of its acquisition was advanced by either attorney or client (hospital). RPC 79. The attempt by Attorneys A and B to revoke the implied or actual authority to share information with Nurse can only apply prospectively to information gathered and work done after termination of representation.

## RPC 154

January 15, 1993

### Representation of Insured, Insurer, and UIM Carrier

*Opinion rules that an attorney may not represent the insured, her liability insurer and the same insurer relative to underinsured motorist coverage carried by the plaintiff.*

#### Inquiry #1

Passenger A was injured in an automobile accident as a result of the admitted negligence of Driver B, who rented a room in A's home. Two other people were injured in another vehicle hit by B. A has underinsured motorist coverage (UIM) of \$200,000 with Insurance Company X. B has a policy of liability insurance of \$25,000/\$50,000 also with Insurance Company X. A sued B and asserted a claim in excess of all insurance coverage. Insurance Company X hired Attorney Y. Attorney Y undertook representation of B, Insurance Company X under the liability policy, and Insurance Company X under the UIM policy.

Does Attorney Y have a disqualifying conflict of interest in representing B, Insurance Company X under the liability policy, and Insurance Company X under the UIM policy?

#### Opinion #1:

Yes. The provisions of G.S. 20-279.21(4) provide for certain subrogation or assignment rights by a UIM insurer against the owner, operator or maintainer of an underinsured vehicle. This would cause the interests of Driver B and Insurance Company X under its UIM policy to likely be materially different and adverse. Therefore, Attorney Y's representation of both clients would cause his representation of one client to be directly adverse to that of the other in violation of Rule 5.1(b). For example, Attorney Y's advice to Insurance Company X to pay a proposed settlement with Passenger A in such a manner as to enable Insurance Company X to proceed against Driver B under the subrogation rights provided in G.S. 20-279.21(4) would necessarily be adverse to Driver B. Conversely for Attorney Y not to so advise Insurance Company X would be potentially adverse to that client.

#### Inquiry #2

Prior to suit, B requested Insurance Company X to pay the liability limits to A but Insurance Company X refused to do so. Insurance Company X stated it had reserved the primary coverage for the two other injured parties. A offered a Covenant Not to Execute Judgment in excess of insurance coverage in return for immediate payment of the liability coverage of \$25,000. Attorney Y offered to settle the case for \$75,000 but refused to tender the \$25,000 liability limits and accept the Covenant from A.

Does Attorney Y have a disqualifying conflict of interest in light of these circumstances?

#### Opinion #2:

Yes. See answer to inquiry #1. Additionally, the circumstances set out in inquiry #2 reveal a further conflict of interest between Insurance Company X and Driver B. It would appear that Insurance company X's interest might be best served by allocating Insurance Company X's primary insurance policy in such a manner as to best benefit its financial obligations under its UIM policy, and such allocation might adversely affect Driver B's interest by raising her personal exposure to the other claimants injured in the accident. Attorney Y would once again be likely to have his ability to represent both clients materially impaired in violation of Rule 5.1.(b)

## RPC 155

October 29, 1993

[Editor's Note: This opinion was originally published as RPC 155 (Second Revision).]

### Contingent Fees in Child Support Cases

*Opinion rules that an attorney may charge a contingent fee to collect delinquent child support.*

#### Inquiry:

May an attorney charge and collect a contingency fee in the amount of one-third of the funds collected for the recovery of delinquent child support when the custodial parent has insufficient means to defray legal expenses?

#### Opinion:

Yes. RPC 2. However, see Davis v. Taylor, 81 N.C. App. 42 (1986).

## RPC 156

October 29, 1993

[Editor's Note: This opinion was originally published as RPC 156 (Revised).]

### Informing Client Concerning Representation

*Opinion rules that an attorney who has advised a client that he has been retained by the client's insurance company to represent him must reasonably inform the client and explain the matter completely when the insurance company pays its entire coverage and is "released from further liability or obligation to participate in the defense" under the provisions of NCGS. 20-279.21(b)(4).*

#### Inquiry:

Attorney A was retained by Insurance Company Y to represent Defendants L and M who are the named insureds on a policy of auto liability insurance issued by Insurance Company Y. A suit was brought by the adverse driver. Attorney A settled the suit for the policy limit applicable to driver's claim and obtained a Release and Dismissal with Prejudice as to driver's claim against L and M. Now Insurance Company Y has paid Plaintiff X the entire policy limits applicable to Plaintiff X's claim and has secured from Plaintiff X a Covenant Not to Enforce Judgment against L and M. With this pay-

ment to Plaintiff X, Insurance Company Y's policy limits have been exhausted. The Plaintiff's underinsured motorist carrier was put on notice of the proposed settlement prior to settlement pursuant to G.S. 20-279.21(b)(4) and the underinsured motorist carrier failed to advance payment to its insured Plaintiff X to preserve its subrogation rights. Plaintiff X has been unable to negotiate a settlement of her UIM claim with her UIM carrier and therefore is in the process of filing suit so that she can recover damages from her underinsured motorist carrier. In the case of Plaintiff X, the only action Attorney A has taken is to write a letter to L and M advising them that suit may be filed and that Attorney A has been retained to represent them. Suit has not been filed yet and therefore Attorney A has not filed an answer on behalf of L and M. Insurance Company Y would like for Attorney A to file a motion with the court when the lawsuit is filed pursuant to G.S. 20-279.21(b)(4) to be released from further liability or obligation to participate in the defense of the proceeding.

Can Attorney A represent Insurance Company Y and file this motion to be released?

#### Opinion:

No opinion is given as to the ethics of filing a motion in a suit that has not yet been filed. Attorney A has written L and M advising them that a suit may be filed, and Attorney A has been retained by Insurance Company Y to represent them. However, since Insurance Company Y has paid its full limits, it is "released from further liability or obligation to participate in the defense" of such proceeding by NCGS. 20-279.21. Under such circumstances, Attorney A is required by Rule 6(b) to keep the client reasonably informed and to fully explain the matter to the extent reasonably necessary to permit the client to make informed decisions regarding this matter.

As Attorney A has written to L and M advising L and M that Attorney A has been retained to represent them, Attorney A should promptly inform L and M, in writing, that Attorney A will not be representing them and explain the full provisions of the statute and the situation to the extent reasonably necessary to permit the clients to make informed decisions regarding employing Attorney A, any other attorney, or electing not to be represented in any future lawsuits under the facts as given.

## RPC 157

April 16, 1993

### Representing a Client of Questionable Competence

*Opinion rules that a lawyer may seek the appointment of a guardian for a client the lawyer believes to be incompetent over the client's objection.*

#### Inquiry #1:

Attorney A represents a client on a social security matter and determines, from confidential

communications with his client, that the client is, in the attorney's opinion, not competent to handle his affairs in relation to the representation and that the client's actions in regard to the matters involved in the representation are detrimental to the client's own interest. For example, the client who sought the attorney's assistance with receipt of benefits from the social security administration, refuses to cash checks obtained for the client from social security despite the client's obvious need for financial support. The attorney believes that either a guardian should be appointed for the client under state law or that a representative payee should be appointed for the client under federal social security law. The client refuses to agree for the attorney to seek the appointment of a guardian, to seek the appointment of a representative payee, or even for the attorney to discuss this problem with the client's family. The attorney is of the opinion that the client lacks the capacity to form objectives necessary for a normal attorney/client relationship.

May the attorney seek the appointment of a guardian or a representative payee for the client?

**Opinion #1:**

Yes. The Rules of Professional Conduct do not speak directly to the question presented. There is language in the comment to Rule 2.8 concerning discharge and withdrawal suggesting that where an attorney is representing a client who is mentally incompetent she may "in an extreme case . . . initiate proceedings for a conservatorship or similar protection of the client." It follows that Attorney A may under the circumstances described seek the appointment of a guardian or a representative payee without the client's consent and over the client's objection if such appears to be reasonably necessary to protect the client's interests. In so doing, the attorney may disclose only her belief that there exists a good faith basis for the relief requested and may not disclose the confidential information which led her to conclude that the client is incompetent, except as permitted or required by Rule 4(c).

**Inquiry #2:**

In taking that action, may the attorney reveal confidential information so as to establish the grounds for guardianship or representative payee status?

**Opinion #2:**

See the answer to inquiry #1.

**Inquiry #3:**

If the attorney may not seek appointment of a representative payee or guardian, must the attorney withdraw from the matter?

**Opinion #3:**

See the answer to inquiry #1.

## RPC 158

April 15, 1994

[Editor's Note: This opinion was originally published as RPC 158 (Third Revision).]

**Advance Payment of Legal Fees**

*Opinion rules that a sum of money paid to a lawyer in advance to secure payment of a fee which is yet to be earned and to which the lawyer is not entitled must be deposited in the lawyer's trust account.*

**Inquiry #1:**

Attorney A undertakes to handle a traffic matter for Client B. Client B gives Attorney A a check for \$400. They agree that \$350 of that sum represents A's fee and the rest is to be used for costs. Attorney A and Client B have no signed fee agreement and there is no specific negotiation between A and B regarding whether the fee would be refundable under any circumstances. Nevertheless, Attorney A considers the fee as a nonrefundable "true retainer."

Attorney A deposits Client B's \$400 check into his attorney trust account and immediately withdraws \$350 which he spends at once. Attorney A leaves the \$50 in costs in the trust account. Two days after Client B has paid Attorney A, Client B discharges Attorney A and demands a refund of the \$400. Attorney A has done no work on the matter, except for a 20 minute initial meeting with Client B. Attorney A gives Client B \$50 only and refuses any additional refund, on the grounds that the \$350 was a nonrefundable retainer.

Has Attorney A violated the Rules of Professional Conduct by immediately withdrawing the entire \$350 fee from his trust account or should he have left the fee in the account until he did more work on B's case?

**Opinion #1:**

In order for a payment made to an attorney to be earned immediately, the attorney must clearly inform the client that it is earned immediately, and the client must agree to this arrangement. In the instant case, it is plain that the fee was negotiated and paid as compensation for services which were to be rendered. Nothing was said by the attorney to indicate that the payment was nonrefundable or earned immediately upon payment. Therefore, despite Attorney A's misperception, the fee was a deposit securing the payment of a fee which was yet to be earned. As such, it was incumbent upon Attorney A to deposit the money in her trust account. See Rule 10.1(c)(2) and official comment. To the extent that any portion of the fee paid in this case was unearned at the time Attorney A was discharged, that amount should be paid back to Client B by check drawn on the trust account. Rule 2.8(a)(3).

**Inquiry #2:**

Attorney Z undertakes to handle a traffic case for Client X. Attorney Z tells X that he will handle the entire matter for \$500 and that the \$500 will cover his fees as well as any fines or costs

in the case. Although Z knows generally how much the fines and costs are in traffic cases, the amounts do vary somewhat, depending upon the judge and the facts of the particular case. Consequently, the smaller the fine and costs, the more of the \$500 which Attorney Z gets to keep as a fee.

Does this fee arrangement violate any provision of the Rules of Professional Conduct?

**Opinion #2:**

No. Although the amount of the fee earned by Attorney Z may be partially indefinite at the time the fee is paid by Client X, the fee earned by Attorney Z is not a contingent fee which would otherwise be prohibited in a criminal case by Rule 2.6(c) of the Rules of Professional Conduct. In order for a fee to be contingent, the fee received by the lawyer and the amount paid by the client must both be contingent upon the outcome of the case. In the present case, the amount paid by Client X remains the same whatever the amount of the fine and whatever the costs. This type of flat charge for representation on a traffic offense gives a client certainty as to the ultimate cost of the representation.

**Inquiry #3:**

How much, if any, of the \$500 must be held in Attorney Z's trust account until the traffic matter is resolved?

**Opinion #3:**

If Attorney Z and Client X intend that the \$500 represents a payment of fees to be earned and costs, then Attorney Z must deposit the entire \$500 in the trust account. If Attorney Z and Client X agree that the payment represents costs and a flat fee to which Attorney Z is immediately entitled, and the payment is in cash, any portion of the payment which is intended to cover costs must be deposited in Attorney Z's trust account and any portion of the payment which is Attorney Z's fee must be deposited in her operating account. See Rule 10.1(c)(2). If Attorney Z and Client X agree that the payment represents costs and a flat fee to which Attorney Z is immediately entitled and the payment of the entire \$500 is by check, the check must be deposited in Attorney Z's trust account and, upon ascertaining the amount of the costs or an amount sufficient to cover the costs, Attorney Z should promptly withdraw that portion that is fee and deposit it in her operating account. Rule 10.1(c)(2). Whether the fee portion is deposited in the trust account or paid over to the operating account, any portion of the fee which is clearly excessive may be refundable to the client either at the conclusion of the representation or earlier if Attorney Z's services are terminated before the end of the engagement. Rule 2.6 (a). See also *O'Brien v. Plumides*, 79 N.C.App. 159, 339 S.E.2d 54, cert. dismissed, 318 N.C. 409, 348 S.E.2d 805 (1986).

**Inquiry #4:**

Will the answer to inquiry #3 be any different depending upon whether Attorney Z and Client X agree that Z's fee is a nonrefundable retainer?

#### Opinion #4:

The situation posited in inquiry #2 does not involve a nonrefundable retainer. See RPC 50. See also opinion #3 above.

### RPC 159

January 14, 1994

[Editor's Note: This opinion was originally published as RPC 159 (Second Revision).]

#### Settlement of Dispute Involving Impropriety of Mental Health Professional

*Opinion rules that an attorney may not participate in the resolution of a civil dispute involving allegations against a psychotherapist of sexual involvement with a patient if the settlement is conditioned upon the agreement of the complaining party not to report the misconduct to the appropriate licensing authority.*

#### Inquiry:

Lawyer L frequently represents patients who have civil claims against psychotherapists with whom they have become sexually involved. Such matters, obviously, have implications in regard to the therapist's license and the defense sometimes wishes to keep the allegations confidential.

May attorneys for the plaintiff and the defendant participate in the resolution of such a matter where settlement is conditioned upon the plaintiff's agreeing not to file a complaint against the defendant, with the State Board of Medical Examiners or any other appropriate licensing body?

#### Opinion:

No. It is unethical for the attorney for either party to participate in the resolution of civil claims involving allegations of sexual involvement with patients by a psychotherapist where the settlement is conditioned upon the complaining party's agreement not to report the psychotherapist's misconduct to the appropriate licensing authority. See Rule 1.2(d).

### RPC 160

July 21, 1994

[Editor's Note: This opinion was originally published as RPC 160 (Second Revision).]

#### Lawyer as Member of Hospital's Board of Trustees

*Opinion rules that a lawyer whose associate is a member of a hospital's board of trustees may not sue the hospital on behalf of a client.*

#### Inquiry #1:

Attorney A is an associate (nonshareholder) in a law firm in North Carolina. He was appointed to the board of trustees of a local hospital on October 7, 1991, and has served as a trustee since that time. The hospital is a public, nonprofit, charitable hospital governed by a board of trustees.

After the appointment of Attorney A as a trustee, Attorney B, a shareholder in the same law firm, filed a malpractice claim against a doctor

and the hospital. Attorney B handled all aspects of the claim from the initial investigation forward without discussing it with Attorney A and without any assistance from Attorney A.

After oral discussions between Attorney A and the hospital attorney concerning his firm's involvement in the case, Attorney A wrote the hospital attorney a letter in which he stated that he did not feel there was a conflict of interest because he had complied with the procedures prescribed in CPR 290. At all times Attorney A refrained from any expression of opinion about the case, as well as from formal or informal consideration of the matter, including any communications with anyone at the hospital concerning the matter, and absented himself from all hospital meetings during any discussion or vote concerning the case. Attorney B reached a settlement of the case through negotiations with attorneys for the doctor and the hospital.

The hospital now has a program which began on October 1, 1990, under which it pays a substantial portion of all malpractice claims out of hospital funds. Prior to October 1, 1990, the hospital was insured, but had a large deductible, and the settlement of this claim was paid entirely out of the deductible.

With respect to any new cases that may arise, would it be ethical for Attorney B to represent a client with a claim against the hospital, so long as there is adherence to the procedures prescribed in CPR 290?

#### Opinion #1:

No. Under Rule 5.1(b), an irreconcilable conflict would exist if a lawyer who is a member of the board of trustees of a nonprofit hospital were to represent a client who is suing the board or the hospital which is managed and controlled by that board. Rule 5.1(b). While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by the Rules of Professional Conduct. Rule 5.11(a) and CPR 66. RPC 53 is hereby overruled.

Other prior ethics opinions which appear to be in conflict with this opinion are distinguishable. CPR 290 allows a lawyer to appear before a government board upon which a lawyer from his or her firm is a member provided four specified steps are taken to insulate the attorney board member from the board's consideration of the particular matter. See also CPR 327. RPC 130 allows a law firm to accept employment on behalf of a governing board upon which its partner sits provided the representation is otherwise lawful and certain steps are taken to insulate the attorney board member from the decision. None of these prior opinions involve the representation of a client whose interests are directly adverse to those of the board and who is filing a lawsuit against the board upon which the attorney board member sits.

CPR 290 and CPR 327 are unchanged by this opinion and remain in effect.

In reliance on RPC 53, lawyers have undertaken to represent clients in litigation or other adversarial proceedings filed against a board upon which a member of their law firm serves. To require lawyers who have relied upon RPC 53 to withdraw from the representation of a client in the midst of an adversarial proceeding or litigation would work a hardship upon the client. Therefore, this opinion shall be applied prospectively. Lawyers may continue to represent clients in litigation or other adversarial proceedings which were filed as of the effective date of this opinion despite service by another lawyer from the same firm on the board. However, the procedures for removing the attorney board member from involvement in the case set forth in CPR 290 must be observed. This opinion shall apply to the representation of clients in litigation or other adversarial proceedings against a board upon which a member of the firm serves which are filed on or after the effective date of the opinion.

#### Inquiry #2:

If the answer to inquiry #1 is "no," is it permissible under any circumstances for Attorney A to sit on the hospital board and for Attorney B at the same time to handle the malpractice case against the hospital?

#### Opinion #2:

See the answer to inquiry #1 above.

#### Inquiry #3:

Finally, would it make any difference in the answers to inquiries #1 and #2 if Attorney A were a shareholder in the firm rather than an associate?

#### Opinion #3:

No.

### RPC 161

April 15, 1994

[Editor's Note: This opinion was originally published as RPC 161 (Revised).]

#### Television Commercials for Legal Services

*Opinion rules that a television commercial for legal services which fails to mention that bankruptcy is the debt relief described in the commercial and which describes results obtained for others is misleading.*

#### Inquiry:

Attorney A advertises on television. The commercial does not mention bankruptcy but the announcer on the commercial says "you can get financial relief" and "you can pay your creditors as little as \$25 per week pursuant to a federal payroll deduction plan." During the commercial, it is stated that relief is "under 11 U.S. Code Section 109." At the end of the commercial, no attorney's name is mentioned. Instead viewers are directed to call a telephone number which has additional recorded information about financial relief from debts. Viewers who call this telephone number listen to a 12-minute

ape recording during which bankruptcy filing options, including bill consolidation under Chapter 13, are discussed. Callers are advised that they have reached "the 24-hour information hotline for debt reorganization." The 12-minute tape does not explain the circumstances under which creditors can be paid "as little as \$25 per week" but it does state that the caller can combine "every bill . . . into one low monthly payment." Does this advertisement fall within the guidelines set forth in the Rules of Professional Conduct?

**Opinion:**  
No. Rule 2.2(a) allows a lawyer to advertise his services on television provided the commercials comply with Rule 2.1. Rule 2.1 prohibits false and misleading communications about a lawyer's services. A communication is false or misleading if it omits a fact necessary to make the statement, as a whole, not materially misleading. Rule 2.1(a). A communication is also false or misleading if it is likely to create an unjustified expectation about the results the lawyer can achieve. Rule 2.1(b).

Under the circumstances described in this inquiry, the failure of the television commercial to mention bankruptcy as the form of relief being described is an omission which makes the commercial materially misleading. Moreover, the statement in the commercial that the viewer "can pay creditors as little as \$25 per week" is inherently misleading and creates an unjustified expectation about the results the lawyer can achieve which is not cured by the additional information in the 12-minute tape.

Rule 2.4(c) requires that the words, "This is an advertisement for legal services" be included at the beginning and ending of any "recorded communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter and with whom the lawyer has no family or prior professional relationship." Viewers who call the telephone number for additional information must be presumed to be in need of legal services. Therefore, the recorded messages must include the statement described in Rule 2.4(c). See RPC 115.

**RPC 162**

July 21, 1994  
[Editor's Note: This opinion was originally published as RPC 162 (Third Revision).]  
**Communications with Opposing Party's Physicians**

*Opinion rules that an attorney may not communicate with the opposing party's nonparty treating physician about the physician's treatment of the opposing party unless the opposing party consents.*

**Inquiry #1:**  
Attorney A is defense counsel in a personal injury case. Through discovery, Plaintiff, P, produces complete medical records from her

attending physicians. The records of certain of these attending physicians appear to be favorable to the defendant and supportive of defendant's theory of the case. Before the case is set for trial, may Attorney A communicate with Plaintiff's physicians without seeking the consent of Plaintiff or her counsel in order to have the physician decipher his handwriting and medical codes in the records that Attorney A has received as a part of discovery in the civil action?

**Opinion #1:**  
No. Communications with Plaintiff's nonparty treating physician concerning any aspect of the physician's treatment of Plaintiff or the substance of the physician's testimony at trial is unethical as against public policy unless the opposing party consents. See *Crist v. Moffatt*, 326 N.C. 326, 389 S.E.2d 41 (1990).

Note: This opinion does not address communications with treating physicians in workers' compensation cases and no opinion is thereby expressed as to any ethical or public policy limitations on such communications. See G.S. 97-27.

**Inquiry #2:**  
Under the same circumstances outlined in inquiry #1, may Attorney A discuss with the physician his generalized opinions without regard to the medical treatment and medical condition of the Plaintiff at issue in the lawsuit?

**Opinion #2:**  
See answer to inquiry #1.

**Inquiry #3:**  
After the case has been called for trial and the physician in question is subpoenaed as a witness for defense, may Attorney A communicate with physician to discuss the matters set forth in inquiries #1 and #2 above?

**Opinion #3:**  
See answer to inquiry #1.

**Inquiry #4:**  
Under the circumstances outlined in inquiry #3, may Attorney A communicate with physician to arrange for his witness's appearance at the trial?

**Opinion #4:**  
Yes, Attorney A may communicate with the plaintiff's nonparty treating physician in order to arrange the physician's appearance at the trial as a witness.

**Inquiry #5:**  
Under the circumstances mentioned in inquiry #3, may Attorney A communicate to physician the questions the attorney expects to pose to the physician at trial, so long as neither privileged information or responses to those inquiries are sought from physician?

**Opinion #5:**  
Yes, provided the communication is in writing.

**RPC 163**

April 15, 1994  
[Editor's Note: This opinion was originally published as RPC 163 (Revised).]

**Request for Independent Guardian Ad Litem Where Existing Guardian Has Conflict**

*Opinion rules that an attorney may seek the appointment of an independent guardian ad litem for a child whose guardian has an obvious conflict of interest in fulfilling his fiduciary duties to the child.*

**Inquiry #1:**  
Attorney X represents A, a seventeen-year old high school student who was injured in a motor vehicle accident at the time that she was riding in an automobile being driven by her mother, M. There is a question as to whether the oncoming vehicle was negligent, whether M was negligent, or both. A's father, F, and M originally asked Attorney X to represent both M and A. Attorney X explained that there appeared to be a conflict of interest between M and A and that Attorney X would be willing to represent only A. M and F agreed. Attorney X entered into a fee agreement with F signing as guardian for A. No lawsuit has been filed at this time. After investigating the motor vehicle accident, Attorney X concluded that M was most likely negligent, although the driver/owner of the oncoming vehicle may also have been negligent. F left a telephone message for Attorney X indicating that he was no longer interested in pursuing A's claims since it appeared likely that M would be the major defendant and if a judgment was entered against her, it would raise F and M's automobile insurance rates. F did not respond to Attorney X's request that he come in to discuss the matter in person. Attorney X wrote to F explaining that M and F's insurance rates would go up if the driver of the other car made a claim against M and, therefore, making a claim on A's behalf would have no additional adverse effect on the family's insurance rates. In this letter, Attorney X told F that he believed that F and M had a moral as well as an ethical duty to A to proceed. Attorney X believes that A's parents are not acting in A's best interests. They appear to be protecting their own interests to the exclusion of A's interests. Having advised F that Attorney X believes that he has an ethical and moral duty to proceed, is Attorney X's ethical duty satisfied?

**Opinion #1:**  
Yes. However, on these particular facts, where F's only stated reason for failing to pursue his daughter's claim is the protection of the family's automobile insurance rates and no other concerns or contingencies have been indicated by F, it would be permissible for Attorney X to seek the appointment of an independent guardian ad litem to represent A's interests. This would be consistent with Attorney X's primary duty to represent the interest of A, who is the real party in interest. See CPR 15.

### **Inquiry #2:**

May Attorney X seek the appointment of an independent guardian ad litem and proceed with filing suit after the independent guardian ad litem has reviewed the case and agrees that Attorney X should proceed?

### **Opinion #2:**

Yes. See opinion #1 above.

## **RPC 164**

October 29, 1993

### **Television Advertising of Legal Services**

*Opinion rules television commercials for an attorney's services that depict fictional clients and cases are misleading and prohibited.*

### **Inquiry #1**

Attorney A wants to advertise on television. The scripts for the commercials are fictional and will be dramatized by actors depicting fictional clients of Attorney A. The scripts are based on representative cases of Attorney A and outcomes that Attorney A has achieved in actual cases. In each script, a fictional client of Attorney A tells the viewer why he or she used Attorney A's services and that Attorney A achieved a good outcome for the fictional client. The fictional client then recommends the service of Attorney A. Is the use of a fictional script based on representative cases of Attorney A and an actor dramatizing the role of a satisfied client a violation of the Rules of Professional Conduct?

### **Opinion #1**

Yes. Commercial dramatizations of fictional cases are misleading communications about Attorney A and Attorney A's services in violation of Rule 2.1. Rule 2.1 prohibits false or misleading communications about a lawyer or the lawyer's services. A communication about a lawyer or the lawyer's services is misleading if it contains a material misrepresentation of fact or omits a fact necessary to make the statement, considered as a whole, not materially misleading. Rule 2.1(a). Viewers of Attorney A's commercials do not know that they are seeing actors and not Attorney A's actual clients. Even if a viewer is astute enough to realize the commercial contains actors, the viewer would not know that the characters, cases and outcomes portrayed are fictional. The commercials are misrepresentations of fact not only because they are dramatized by actors but also because they do not describe or depict actual events or cases handled by Attorney A.

### **Inquiry #2**

In the event that you find a violation of the Rules of Professional Conduct, would the use of a written disclaimer on the screen, such as "Dramatization," remedy such violation?

### **Opinion #2**

No. See opinion #1.

## **RPC 165**

October 29, 1993

### **Providing Confession of Judgment to Unrepresented Adverse Party**

*Opinion rules that an attorney may provide a confession of judgment to an unrepresented adverse party for execution by that party so long as the lawyer does not undertake to advise the adverse party or feign disinterestedness.*

### **Inquiry:**

Attorney represents the custodial parent of minor children. The noncustodial spouse has agreed to pay child support in an amount equal to that determined by application of the child support guidelines promulgated pursuant to NCGS. 50-13.4(c). Attorney and custodial parent wish to have the child support payable through the clerk of superior court. May the attorney mail a confession of judgment to the unrepresented opposing party for execution and subsequent submission to the clerk of Superior Court for endorsement and entry of judgment?

### **Opinion:**

Yes. A lawyer may communicate directly with an adverse party who is not known to be represented by counsel in regard to the matter at issue. Rule 7.4(a). In order to accomplish her client's purposes, the attorney may draft a confession of judgment for execution by the adverse party and solicit its execution by the adverse party so long as the attorney does not undertake to advise the unrepresented party concerning the meaning or significance of the document or to state or imply that she is disinterested. Rule 7.4(b) and (c). The attorney should advise the adverse party that she represents her client, that she cannot give legal advice to the adverse party, and that the adverse party should seek the advice of another attorney concerning whether he should sign the confession of judgment. Although previous ethics opinions, CPRs 121 and 296, have ruled that it is unethical for a lawyer to furnish consent judgments to unrepresented adverse parties for their consideration and execution, there appears to be no basis for such a prohibition when the lawyer is not furnishing a document which appears to represent the position of the adverse party such as an answer, and the lawyer furnishing a confession of judgment or consent judgment does not undertake to advise the adverse party or feign disinterestedness. CPRs 121 and 296 are therefore overruled to the extent they are in conflict with this opinion.

## **RPC 166**

January 14, 1994

### **Increases in Lawyer's Hourly Rate**

*Opinion rules that a lawyer may seek to renegotiate a fee agreement with a client provided he does not abandon or threaten to abandon his client to cut his losses or to coerce a higher fee.*

### **Inquiry #1:**

Where Firm A has an existing contract with a client specifying that fees will be based on usual hourly rates, is it ethical for Firm A to unilaterally impose increases to its hourly rates (ranging from 5% to 10%) without securing further consent from its client regarding these increases?

### **Opinion #1:**

The inquiry appears to ask for a legal construction of a fee contract with a client and only provides an incomplete description of the contract. To the extent that a legal construction of a fee contract is sought, this is a question of law upon which no opinion is expressed.

There are ethical considerations raised by the inquiry. As noted in the comment to Rule 2.6 of the Rules of Professional Conduct, "[a]n attorney may seek to renegotiate his fee agreement in light of changed circumstances or for other good cause, but he may not abandon or threaten to abandon his client to cut his losses or to coerce an additional higher fee." Moreover, an attorney may not charge a clearly excessive fee under any circumstances, including renegotiation of his fee. Rule 2.6(a).

### **Inquiry #2:**

If a schedule for hourly rates for each attorney has been attached to the original engagement agreement (which includes an agreement as to fees), would it then be ethical for Firm A to impose a unilateral increase to the hourly rates of those attorneys listed on the schedule without securing further consent from the client?

### **Opinion #2:**

See opinion #1 above.

### **Inquiry #3:**

Is the answer to either (1) or (2) affected by a provision in the fee contract that specifically gives Firm A the right to increase fees annually?

### **Opinion #3:**

See opinion #1 above.

## **RPC 167**

January 14, 1994

### **Receiving Compensation from Potentially Adverse Party**

*Opinion rules that a lawyer may accept compensation from a potentially adverse insurance carrier for representing a minor in the court approval of a personal injury settlement provided the lawyer is able to represent the minor's interests without regard to who is actually paying for his services.*

### **Inquiry #1:**

Attorney A frequently receives a case from an insurance adjuster who has negotiated a settlement of a minor's personal injury claim with the unrepresented family of the minor. Typically, the insurance adjuster will request that Attorney A obtain court approval of the settlement. Attorney A usually asks an attorney in private practice to represent the minor and his or her parents, if they also have a claim, in connection with a "friendly lawsuit" which is filed in the ap-

appropriate court for judicial approval of the minor's settlement. The attorney who is representing the minor is paid directly by the insurance company in order to avoid reducing the negotiated settlement amount. May the attorney who is representing the minor and the parents accept payment from the liability insurance company without violating any of the provisions of the Rules of Professional Conduct?

**Opinion #1:**

Yes. Rule 5.6 of the Rules of Professional Conduct allows a lawyer to be paid from a source other than the client provided the following conditions are met:

- (a) The client consents after full disclosure;
- (b) There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (c) Information relating to representation is protected as required by Rule 4.

When a lawyer undertakes to represent a minor and his or her parents under the circumstances described in inquiry #1, he is bound by the duty of loyalty to represent the best interests of his clients "without regard to who is actually paying for [his] services or the interests of such other third party or entity." CPR 346. If the lawyer reasonably believes the payment arrangement will adversely affect his representation of the minor and the minor's family, the lawyer must decline the employment. See Rule 5.1(b)(1).

**Inquiry #2:**

If it is unethical to accept a legal fee paid by the insurance company outside of the settlement, is it ethical for the attorney representing the minor and the parents to charge a flat rate to the family for his services in aiding the approval of the minor's settlement and then allow the insurance company to add the amount of that flat rate to the total settlement so that the amount received and retained by the minor and the parents is the same as the amount for which they originally negotiated?

**Opinion #2:**

See opinion #1 above.

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**RPC 168**

April 15, 1994

[Editor's Note: This opinion was originally published as RPC 168 (Revised).]

**Waiver of Objection to a Possible Future Conflict of Interest**

*Opinion rules that a lawyer may ask her client for a waiver of objection to a possible future representation presenting a conflict of interest if certain conditions are met.*

**Inquiry #1:**

The ABA recently issued Formal Opinion 93-372 allowing waivers of future conflicts of interest under certain circumstances. The Model Rules address conflicts of interest in Model Rule 1.7. Model Rule 1.7 is substantially identical to Rule 5.1(a) and (b) of the North Carolina

Rules of Professional Conduct. Is it permissible for a North Carolina lawyer to obtain an advance waiver of future conflicts from a client or prospective client?

**Opinion #1:**

Yes, it is permissible provided the following conditions, which are set forth and explained in ABA Formal Opinion 93-372, are met:

- 1) The prospective waiver of a future conflict of interest is in writing;
- 2) Although the future conflict may not be known to exist at the time of the waiver, the writing must demonstrate that the future conflict, when it arises, was within the contemplation of the parties;
- 3) It must be patently clear that the existing representation will not be adversely affected by the subsequent representation; and
- 4) The subsequent representation will not result in disclosure or use of information imparted by the client in the representation existing at the time of the waiver, or any subsequent representation of that client.

ABA Formal Opinion 93-372 is hereby adopted by reference.

**Inquiry #2:**

If a waiver of future conflicts of interest is obtained from a client or a prospective client, will it be effective?

**Opinion #2:**

Yes, if the conditions set forth in opinion #1 were met at the time the written waiver was executed and, if a conflict subsequently arises, the conflict was contemplated by the parties at the time the written waiver was executed, the existing representation will not be adversely affected by the subsequent representation, and the subsequent representation will not result in the disclosure or use of confidential information of the client giving the waiver.

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**RPC 169**

January 14, 1994

**Providing Client with Copies of Documents from the File**

*Opinion rules that a lawyer is not required to provide a former client with copies of title notes and may charge a former client for copies of documents from the client's file under certain circumstances.*

**Inquiry #1:**

Attorney represented Ex-client on a number of real estate transactions prior to the termination of the employment. Attorney provided Ex-client with the original documents or copies of most of the pertinent documents at the time of the closing for each real estate transaction. All of the real estate transactions Attorney handled for Ex-client were completed and Attorney no longer represents Ex-client. Ex-client has asked Attorney to provide him with copies of the documents in his closed real estate files. Attorney has provided Ex-client with copies of deeds, maps, title opinions, title insurance poli-

cies, correspondence and all of the significant information regarding the purchases and the loans for Ex-client's respective properties. He has not provided Ex-client with copies of his title notes. Attorney considers his title notes to be work product which often involves using base title notes for subdivisions or title notes from other files as well as the conveyance list files maintained by Attorney's law firm. Is Attorney ethically required to provide Ex-client with a copy of the title notes for the properties?

**Opinion #1:**

No. Although Rule 2.8(a)(2) requires a lawyer to deliver to a former client "all papers. . . to which the client is entitled," the comment to the rule notes that "[t]he lawyer's personal notes. . . need not be released." See also CPR 3.

**Inquiry #2:**

If Attorney does not condition the delivery of the copies to Ex-client on the payment of his bill for prior legal services, may Attorney charge Ex-client for the copies he delivers to Ex-client of documents which Attorney had already provided to Ex-client at the time of the closings?

**Opinion #2:**

Yes. When Attorney delivered the original documents to Ex-client at the time of the closings for the real estate transactions, he fulfilled the requirements of Rule 2.8 (a)(2). If Attorney kept copies of these original documents, Attorney may charge Ex-client for any additional copies which Attorney makes for Ex-client but attorney may not condition the delivery of these copies to Ex-client on the payment of his bill for legal services. If Attorney retained in his office files any original documents from Ex-client's real estate transactions, Attorney must bear the cost of making copies for Ex-client until such time as he delivers the original documents to Ex-client.

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**RPC 170**

April 15, 1994

[Editor's Note: This opinion was originally published as RPC 170 (Revised).]

**Joint Representation of Injured Party and Medical Insurance Carrier Holding Subrogation Agreement**

*Opinion rules that a lawyer may jointly represent a personal injury victim and the medical insurance carrier that holds a subrogation agreement with the victim provided the victim consents and the lawyer withdraws upon the development of an actual conflict of interest.*

**Inquiry #1:**

Attorney A represents Victim B with respect to her personal injury claim. Carrier C provides health insurance benefits under an ERISA health insurance plan. Victim B has signed a "subrogation authorization form" for Carrier C which purports to give Carrier C the right to seek reimbursement directly from Tortfeasor D for benefits paid on behalf of Victim B because

of her injuries. For purposes of effecting this recovery from Tortfeasor D, Carrier C wants to retain Attorney A to also represent Carrier C. May Attorney A represent both Victim B and Carrier C?

**Opinion #1:**

Yes, if Attorney A reasonably believes the representation will not be adversely affected and the client consents after full disclosure of the implications of the common representation. Rule 5.1(b).

**Inquiry #2:**

If so, what must Attorney A do if an actual conflict of interest arises in representing both parties?

**Opinion #2:**

Attorney A has a continuing obligation to evaluate the situation and must withdraw from the representation of both parties upon the development of an actual conflict of interest, unless one party consents, after full disclosure, to Attorney A's continued representation of the other party. Rule 5.1(c) and Rule 5.1(d).

**Inquiry #3:**

Is there any way, by advance agreement with Carrier C or otherwise, for Attorney A to ethically continue representing Victim B in the event that a conflict of interest arises?

**Opinion #3:**

Yes, provided the four conditions for a waiver of a future conflict of interest set forth in RPC 168 are met at the time that a conflict arises. See Rule 5.1(c).

## RPC 171

April 15, 1994

[Editor's Note: This opinion was originally published as RPC 171 (Revised).]

### Tape Recording Conversation with Opposing Lawyer

*Opinion rules that it is not a violation of the Rules of Professional Conduct for a lawyer to tape record a conversation with an opposing lawyer without disclosure to the opposing lawyer.*

**Inquiry:**

Is it unethical for an attorney to make a tape recording of a conversation with an opposing attorney regarding a pending case, without disclosing to the opposing attorney that the conversation is being recorded?

**Opinion:**

No, it would not be a violation of the Rules of Professional Conduct. However, as a matter of professionalism, lawyers are encouraged to disclose to the other lawyer that a conversation is being tape recorded.

## RPC 172

April 15, 1994

### Representation of Insured on Compulsory Counterclaim

*Opinion rules that an attorney retained by an insurance carrier to defend an insured has no ethical obligation to represent the insured on a compulsory counterclaim provided the attorney apprises the insured of the counterclaim in sufficient time for the insured to retain separate counsel.*

**Inquiry #1:**

Motor vehicle liability insurance carrier hires Defense Counsel to represent its insured, A, who has been sued for motor vehicle negligence. There is a compulsory counterclaim which could be made on behalf of A. Is it ethical for Defense Counsel to answer the complaint, omit the compulsory counterclaim and advise A of the need to retain separate counsel at A's expense in order to prosecute the claim within the 30 day amendment period provided by Rule 15 of the Rules of Civil Procedure?

**Opinion #1:**

No. There are two separate aspects of the representation of A in this fact situation. One is the defense of A and the other is the representation of A on the counterclaim. The defense of A is governed by the insurance agreement, the Rules of Professional Conduct, and the ethics opinions adopted by the State Bar. By paying premiums for insurance, A purchased indemnity coverage for liability claims and a legal defense. A did not contractually acquire a right to have a claim prosecuted on his or her behalf. That is a matter which is up to A to negotiate with counsel of A's choice. A may negotiate with Defense Counsel to represent A on the counterclaim and Defense Counsel may choose to represent A on the counterclaim if Defense Counsel reasonably foresees no conflict of interest. Defense Counsel is under no ethical obligation to assert a compulsory counterclaim on behalf of A. Having been retained to defend A, however, it is incumbent upon Defense Counsel to take reasonable steps to apprise A of the compulsory nature of the counterclaim prior to the filing of the answer to the complaint and in sufficient time for A to negotiate the prosecution of the counterclaim with Defense Counsel or for A to retain separate counsel to prosecute the counterclaim in concert with Defense Counsel's defense of the claim.

**Inquiry #2:**

May Defense Counsel fulfill his ethical obligations to A by drafting the counterclaim and including it in the answer on the condition that A sign the pleading as "pro se counterclaimant" and with the understanding that Defense Counsel will not represent A on the counterclaim?

**Opinion #2:**

Yes, if Defense Counsel does not wish to represent A on the counterclaim and A cannot find separate counsel to prosecute the counterclaim.

## RPC 173

April 15, 1994

### Advancing Funds to Client to Post Bond

*Opinion rules that a lawyer who represents a client on a criminal charge may not lend the client the money necessary to post bond.*

**Inquiry:**

Attorney A represents Client B who is charged with assault on a female. In light of G.S. 15A-541 and Rule 5.3(B) of the Rules of Professional Conduct, may Attorney A ethically lend Client B the sum necessary for Client B to post a cash bond?

**Opinion:**

No. Rule 5.3(B) prohibits a lawyer from advancing or guaranteeing financial assistance to his client while representing the client in connection with contemplated or pending litigation. Although the Rule contains an exception allowing a lawyer to advance the expenses of litigation provided the client remains ultimately liable for such expenses, lending a client the funds necessary to post a cash bond does not fall within this exception and is contrary to the policies prohibiting conflicts of interest and solicitation which underlie Rule 5.3(B). A lawyer who lends a client the funds to post a bond has a vested interest in seeing that the client is apprehended if he or she flees the jurisdiction. This creates a conflict of interest for the lawyer between his professional responsibilities to his client and his personal interests. Also, there is a strong likelihood that a lawyer could solicit clients by suggesting that he is willing to lend a criminal defendant bond money in order to solicit the defendant's criminal case.

Whether lending a client the funds to post a bond is a violation of G.S. 15A-541 is a question of law upon which the State Bar has no authority to rule.

## RPC 174

April 15, 1994

### Fees for the Collection of "Med-Pay"

*Opinion rules that a legal fee for the collection of "med-pay" which is based upon the amount collected is unreasonable.*

**Inquiry:**

Lawyer B charges \$150.00 to collect up to \$2000.00 due to a client under the medical payments provisions (or "med-pay" provisions) of the client's liability insurance policy. He charges \$250.00 to collect a client's med-pay if the med-pay is \$2000.00 or more. Is it ethical for Lawyer B to charge a sliding fee for the collection of med-pay?

**Opinion:**

No. RPC 35 ruled that a lawyer may not charge a contingent fee to collect med-pay because with most med-pay claims there is no risk that the insurance company will refuse payment and there is no dispute as to the amount due to the claimant. Therefore, such contingent fees

are unreasonable, in violation of Rule 2.6(A), because "[t]he element of risk which is necessary to justify the typically elevated contingent fee is not present." Unless there exists a significant risk that a med-pay claim will not be paid, it is unreasonable for a lawyer to charge a fee for collecting med-pay which is not related to the cost to the lawyer of providing the service. A sliding fee for collecting med-pay claims is based upon the amount of the claim and not upon the cost to Lawyer B to provide the service. Such a fee structure is unreasonable in violation of Rule 2.6(A).

## RPC 175

January 13, 1995

[Editor's Note: This opinion was originally published as RPC 175 (Revised).]

### Reporting Child Abuse

*Opinion rules that a lawyer may ethically exercise his or her discretion to decide whether to reveal confidential information concerning child abuse or neglect pursuant to a statutory requirement.*

#### Inquiry #1:

RPC 120 was adopted by the Council of the State Bar on July 17, 1992. The opinion provides that a lawyer may, but need not necessarily, disclose confidential information concerning child abuse pursuant to a statutory requirement set forth in G.S. 7A-543 *et seq.* In 1993 the North Carolina General Assembly amended G.S. 7A-543 and G.S. 7A-551. G.S. 7A-543 now generally provides that as follows: "... any person or institution who has cause to suspect that any juvenile is abused, neglected, or dependent ... or has died as a result of maltreatment shall report the case of that juvenile to the director of the Department of Social Services in the county where the juvenile resides or is found.

G.S. 7A-551 now generally provides as follows:

... [n]o privilege shall be grounds for any person or institution failing to report that a juvenile may have been abused, neglected or dependent, even if the knowledge or suspicion is acquired in an official professional capacity, except when the knowledge or suspicion is gained by an attorney from that attorney's client during representation only in the abuse, neglect or dependency case.

Does Rule 4 of the Rules of Professional Conduct require an attorney report his or her suspicion that a child is abused, neglected or dependent to the local department of social services (DSS) if the information giving rise to the suspicion was gained during a professional relationship with a client, which is not for the purpose of representing the client in an abuse, neglect or dependency case, and the information would otherwise be considered confidential information under Rule 4?

#### Opinion #1:

No. Rule 4(B) prohibits a lawyer from revealing the confidential information of his or her client except as permitted under Rule 4(C). Rule 4(C) includes a number of circumstances under which a lawyer "may reveal" the confidential information of his or her client. Subsection (3) of Rule 4(C) allows a lawyer to reveal confidential information "when ... required by law or court order."

The rule clearly places the decision regarding the disclosure of a client's confidential information within the lawyer's discretion. While that discretion should not be exercised lightly, particularly in the face of a statute compelling disclosure, a lawyer may in good faith conclude that he or she should not reveal confidential information where to do so would substantially undermine the purpose of the representation or substantially damage the interests of his or her client. See Rule 7.1(A)(3) (which prohibits actions by a lawyer which will intentionally "[p]rejudice or damage his client during the course of the professional relationship. . . .") For example, a lawyer may be unwilling to comply with the child abuse reporting statute because he or she believes that compliance would deprive a client charged with a crime of the constitutional right to effective assistance of counsel. Under such circumstances, where a lawyer reasonably and in good faith concludes that revealing the confidential information will substantially harm the interests of his or her client and, as a matter of professional responsibility, declines to report confidential client information regarding suspected child abuse or neglect to DSS, the failure to report will not be deemed a violation of Rule 1.2(B) and (D) (respectively defining misconduct as committing a criminal act and engaging in conduct prejudicial to the administration of justice) or Rule 7.2(A)(3) (prohibiting a lawyer from concealing that which he is required by law to reveal). It is recognized that the ethical rules may not protect a lawyer from criminal prosecution for failure to comply with the reporting statute.

#### Inquiry #2:

Is it ethical for a lawyer to reveal confidential information of a client regarding suspected child abuse or neglect to DSS pursuant to the requirements of the child abuse reporting statute?

#### Opinion #2:

Yes, a lawyer may ethically report information gained during his or her professional relationship with a client to DSS in compliance with the statutory requirement even if to do so may result in substantial harm to the interests of the client. Rule 4(C)(3).

*Note: The foregoing opinion is limited to the specific inquiries set out therein. It should not be read to stand for the general proposition that an attorney's good faith is a bar to a disciplinary proceeding based upon the attorney's violation of a statute.*

## RPC 176

July 21, 1994

### Conflict of Interest Involving a Legal Assistant

*Opinion rules that a lawyer who employs a paralegal is not disqualified from representing a party whose interests are adverse to that of a party represented by a lawyer for whom the paralegal previously worked.*

#### Inquiry:

Attorney A had two full-time staff members: a receptionist/secretary and a paralegal/secretary ("Paralegal"). Paralegal's normal duties included working on personal injury actions and real estate matters. On occasion, Paralegal helped with domestic actions. While Paralegal was employed by Attorney A, Attorney A represented Client A in a domestic matter. Paralegal denies working on the case on a regular basis while she was employed by Attorney A. Paralegal also denies having any knowledge of the specific facts of the case. Attorney A contends that Paralegal was substantially involved in assisting in the representation of Client A and was privy to confidential information regarding Client A. It is clear that Paralegal had some exposure to the case while employed by Attorney A.

After the employment of Paralegal was terminated by Attorney A, Paralegal went to work for Attorney B in another law firm. Attorney B represents Client B in the same domestic action in which Attorney A represents Client A.

Attorney A has requested that Attorney B withdraw from the representation of Client B because of Paralegal's prior involvement in the action. Should Attorney B withdraw from the representation of Client B?

#### Opinion:

No, Attorney B may continue to represent Client B in the case and may continue to employ Paralegal. The imputed disqualification rules contained in Rule 5.11 of the Rules of Professional Conduct do not apply to nonlawyers. However, Attorney B must take extreme care to ensure that Paralegal is totally screened from participation in the case even if Paralegal's involvement in the case while employed by Attorney A was negligible. See RPC 74. This requirement is consistent with a lawyer's duty, pursuant to Rule 3.3(B), to make reasonable efforts to ensure that the conduct of a nonlawyer over whom the lawyer has direct supervisory authority is compatible with the professional obligations of the lawyer including the obligation to avoid conflicts of interest and to preserve the confidentiality of client information.

## RPC 177

July 21, 1994

### Representation of Insured, Insurer, and UIM Carrier

*Opinion rules that an attorney may represent the insured, his liability insurer, and the same*

insurer relative to underinsured motorist coverage carried by the plaintiff if the insurer waives its subrogation rights against the insured and the plaintiff executes a covenant not to enforce judgment.

#### **Inquiry #1:**

Attorney A is retained by Insurance Company to represent Defendant M in an automobile negligence lawsuit under its policy with Defendant M which provides him with liability coverage. Attorney A makes an appearance in the lawsuit on behalf of Defendant M, files responsive pleadings and discovery, and otherwise actively defends Defendant M.

Insurance Company also provides underinsured motorist coverage for Plaintiff. Insurance Company tenders its liability coverage limits to Plaintiff pursuant to NCGS. 20-279.21(b)(4) and waives all subrogation rights against Defendant M. In addition, Plaintiff agrees to execute a covenant not to enforce judgment against Defendant M. The lawsuit initiated by Plaintiff against Defendant M will continue so that Plaintiff can recover UIM proceeds from Insurance Company.

After tender of Insurance Company's liability limits, can Attorney A remain in the case as attorney for Insurance Company and protect Insurance Company's interests under its UIM coverage in the lawsuit, with Defendant M's consent, since Defendant M has no personal exposure?

#### **Opinion #1:**

Yes. Rule 5.1(B). RPC 154, also involving an automobile negligence case, addressed the question of whether a lawyer may represent both the defendant, under an insurance company's liability policy with the defendant, and the same insurance company under its UIM policy with the plaintiff. The opinion noted that the provisions of G.S. 20-279.21(b)(4) give certain subrogation or assignment rights to an UIM insurer against the owner, operator or maintainer of an underinsured vehicle. Therefore, RPC 154 held that an attorney representing both parties would have a disqualifying conflict of interest because the subrogation or assignment rights of the insurance company would cause the interests of the defendant and the insurance company under its UIM policy to be materially different and adverse. See, also, RPC 110.

In the instant inquiry, Defendant M has no personal liability because Insurance Company has waived its right of subrogation against Defendant M, and Plaintiff has executed a covenant not to enforce judgment against Defendant M. The interests of Defendant M and Insurance Company are not, therefore, adverse, and Attorney A would not be likely to have his ability to represent both parties materially impaired in violation of Rule 5.1(B).

#### **Inquiry #2:**

If the answer to inquiry #1 is affirmative, must a motion be filed and an order entered relieving Attorney A of his duty to defend Defen-

dant M and substituting him as attorney of record for Insurance Company?

#### **Opinion #2:**

No opinion is given with regard to whether any changes in the nominal appearance of Attorney A in the lawsuit need to be made, or with regard to the procedural requirements under G.S. 20-279.21(b)(4) for making an appearance in the lawsuit on behalf of Insurance Company as the UIM insurer. However, if Insurance Company elects, pursuant to the provisions of G.S. 20-279.21, to appear in the action in its own name as the UIM insurer and to be released from further liability or obligation to participate in the defense of Defendant M, Attorney A must comply with the requirements of the statute with regard to apprising Defendant M "of the nature of the proceeding and [giving him] the right to select counsel of his own choice to appear in the action on his separate behalf." Attorney M must explain the nature of the proceedings to the extent reasonably necessary to permit Defendant M to make an informed decision with regard to individually retaining another lawyer to represent him or electing not to be represented in the lawsuit. RPC 156.

### **RPC 178**

October 21, 1994

[Editor's Note: This opinion was originally published as RPC 178 (Revised).]

#### **Release of Client's File**

*Opinion examines a lawyer's obligation to deliver the file to the client upon the termination of the representation when the lawyer represents multiple clients in a single matter.*

#### **Inquiry #1:**

Attorney represented Client A on complicated litigation which resulted in the settlement and voluntary dismissal of all claims. Numerous documents were filed with the court and exchanged between the adverse parties. Client A agreed to reimburse Attorney for all out-of-pocket expenses associated with the representation. After the settlement agreement was signed, Client A obtained new counsel who required Client A to sign a release requesting Client A's file from Attorney. The release provides that only authorized out-of-pocket expenses will be reimbursed. Client A then requested a copy of the entire file from Attorney but refused to authorize Attorney to incur any out-of-pocket expenses. Is Attorney ethically required to incur the expense of copying the seven cartons of papers which constitute the file when Client A agreed to pay for the out-of-pocket expenses associated with the representation?

#### **Opinion #1:**

Yes, if Attorney would like to keep a copy of the documents in the file for her own records. Rule 2.8(A)(2) of the Rules of Professional Conduct requires a lawyer who is withdrawing from a case to deliver to the client all papers and

property to which the client is entitled. By requiring a withdrawing or dismissed lawyer to provide the client with all of his or her papers and property, Rule 2.8(A)(2) recognizes that the file belongs to the client. See CPR 3, CPR 315, CPR 322 and CPR 328.

CPR 3 explains that a lawyer must provide a former client with originals or copies of anything in the file which would be helpful to the new lawyer but that "[t]he discharged lawyer's notes made for his own future reference and study and similar things not representing a completed work product need not be turned over."

#### **Inquiry #2:**

If Attorney represented several other clients in the same matter in which she represented Client A, is Attorney required to incur the expense of copying the file for each of the several clients she represented in the litigation?

#### **Opinion #2:**

No. Attorney must only incur the expense for making one set of copies to keep as her own record of the file. However, if Attorney has represented multiple clients on the same matter, she may give the original file to the client that the other clients agree should receive the original file and the other clients may make their own arrangements to get a copy of the file. If the clients cannot agree among themselves as to which client should receive the original file, Attorney may give the file to the client that the majority of the clients designate as the person who should receive the file or she may retain the file until such time as she receives a written agreement from all of the clients or a court order indicating to whom she should give the original file.

#### **Inquiry #3:**

Attorney is still representing a majority of the clients on the particular matter and the original file is required for the representation of the remaining clients. If Client A decides to obtain new legal counsel, is Attorney required to incur the expense of copying the file for Client A?

#### **Opinion #3:**

No. She must give Client A a reasonable opportunity to make copies of the materials in the file but does not have to do so at her own expense. However, any original documents in the file that relate solely to Client A must be given to Client A. If those original documents are not given to Client A, Attorney must make a copy for Client A at Attorney's expense and, until the original is provided to Client A, Attorney must provide and pay for copies of the original document requested by Client A. See RPC 169.

#### **Inquiry #4:**

Who is entitled to retain the original documents procured, filed, or exchanged on behalf of all the clients?

#### **Opinion #4:**

See opinion #2 above. If the clients cannot agree who should get custody of the file, Attorney must give each client a reasonable opportunity to copy the materials in the file at his or her own expense. Attorney may withhold the deliv-

ery of the original file to one of the clients until she receives a court order or written agreement of the clients indicating that the original file may be released to a designated individual.

#### **Inquiry #5:**

If Attorney delivered original documents, but not the entire file, to Client A during the course of the representation, has she fulfilled the requirement under Rule 2.8(A)(2) to deliver the file to the client so that she may charge Client A for additional copies of these original documents?

#### **Opinion #5:**

When Attorney delivered original documents to Client A during the course of the representation, she fulfilled the requirements of Rule 2.8(A)(2) with regard to the delivery of those original documents. See RPC 169. If Attorney kept copies of the original documents, Attorney may charge Client A for any additional copies of those documents which Attorney makes for Client A, but Attorney may not condition the delivery of these copies upon the payment of her bill for services. See RPC 169. However, to the extent that there are other documents in the file, either originals or copies, which were not previously provided to Client A, Attorney has not fulfilled the requirement under Rule 2.8(A)(2) to deliver the entire file to the client upon the conclusion of the representation. With regard to Attorney's duty to deliver the file when she has multiple clients, see opinions #2, #3, and #4 above.

#### **Inquiry #6:**

If the original documents were timely filed with the court or delivered to a third party on behalf of Client A and/or the other clients, has Attorney fulfilled the requirement under Rule 2.8(A)(2) to deliver the file to the client so that she may charge Client A and/or the other clients for additional copies of these original documents?

#### **Opinion #6:**

No. See opinion #5 above.

### **RPC 179**

July 21, 1994

#### **Settlement Agreement Restricting a Lawyer's Practice**

*Opinion rules that a lawyer may not offer or enter into a settlement agreement that contains a provision barring the lawyer who represents the settling party from representing other claimants against the opposing party.*

#### **Inquiry #1:**

Attorney A and cocounsel represent several plaintiffs whose civil rights and constitutional rights were allegedly violated as a result of the conduct of defendant municipality and several of its employees. During the course of litigation and settlement negotiations, individual settlement offers are made by Attorney B and his cocounsel who represent the municipality and its employees.

Attorney B submits to Attorney A a settlement agreement and release that requires Attorney A and his cocounsel to join in the release and agree not to represent any potential claimants (other than those already represented by Attorney A and cocounsel) who may have also been damaged by the alleged conduct of the municipality. The settlement documents also contain provisions requiring confidentiality as to the terms and content of the settlement agreement and the sealing of the agreement by court order. Because the defendant is a municipality, in order to seal what would otherwise be public records, a court order will have to be entered pursuant to NCGS. 132-1.3(b).

May Attorney A enter into such an agreement?

#### **Opinion #1:**

No. A lawyer may not be a party to a settlement agreement wherein he agrees to refrain from representing other potential plaintiffs in the future. To do so would be a violation of Rule 2.7(B) which prohibits a lawyer from entering into an agreement, in connection with the settlement of a controversy or suit, that restricts his right to practice law. Although public policy favors settlement, the policy that favors full access to legal assistance should prevail.

Nevertheless, participation in a settlement agreement conditioned upon maintaining the confidentiality of the terms of the settlement is not unethical. The amount and terms of any settlement which is not a matter of public record are the secrets of a client which may not be disclosed by a lawyer without the client's consent. If a client desires to enter into a settlement agreement requiring confidentiality, the lawyer must comply with the client's request that the information regarding the settlement be confidential. See Rule 4.

#### **Inquiry #2:**

May Attorney B offer such a settlement agreement?

#### **Opinion #2:**

No. A lawyer may not offer a settlement agreement that contains a restriction on a lawyer's right to practice law as a condition of the agreement. See Rule 2.7(B).

#### **Inquiry #3:**

What should Attorney A do when his client desires to accept the agreement?

#### **Opinion #3:**

Attorney A must advise his client that neither he nor Attorney B may ethically participate in an agreement restricting a lawyer's right to practice law.

#### **Inquiry #4:**

May Attorney A withdraw with the permission of the client so that the client may accept the monetary terms of the settlement?

#### **Opinion #4:**

Since the participation of both the plaintiff's attorney and the defendant's attorney in such an agreement is unethical, this inquiry is moot.

#### **Inquiry #5:**

May Attorney B settle with Attorney A's then former client after Attorney A withdraws?

#### **Opinion #5:**

See opinion #4 above.

#### **Inquiry #6:**

May Attorney A and his client agree, as part of a settlement, not to be heard when Attorney B seeks, at an *ex parte* proceeding, to seal otherwise public records under NCGS. 132-1.3(b), when Attorney A believes that there is no apparent basis in law for requesting the sealing other than preventing a class action or additional lawsuits?

#### **Opinion #6:**

It is not unethical for Attorney A to agree not to be heard when Attorney B attempts to show to the court that the requirements of the statute allowing the sealing of the record have been met. See NCGS. 132-1.3(b). It is the responsibility of Attorney B to not advance claims that are unwarranted under existing law unless there is a good faith argument for an extension or modification of existing law. See Rule 7.2(A)(2).

### **RPC 180**

July 21, 1994

#### **Communications with Opposing Party's Physicians**

*Opinion rules that a lawyer may not passively listen while the opposing party's nonparty treating physician comments on his or her treatment of the opposing party unless the opposing party consents.*

#### **Inquiry #1:**

Attorney A is defense counsel in a personal injury case. When the case is set for trial, Attorney A subpoenas Plaintiff's treating physician ("Doctor") for trial. Doctor then contacts Attorney A to discuss the subpoena. Although Attorney A asks no questions regarding Plaintiff's medical treatment, Doctor begins to discuss Plaintiff's medical condition with Attorney A. May Attorney A passively listen while Doctor discusses Plaintiff's medical treatment, or does Attorney A have an affirmative duty to inform Doctor that he cannot participate in communications regarding the treatment of Plaintiff without Plaintiff's consent other than to arrange for Doctor's appearance at trial as a witness?

#### **Opinion #1:**

Attorney A may not participate, either passively or actively, in communications with Plaintiff's nonparty treating physician concerning the physician's treatment of Plaintiff unless Plaintiff consents. To do so is contrary to public policy and, therefore, unethical. See *Crist v. Moffatt*, 326 N.C. 326, 389 S.E.2d 41 (1990) and RPC 162. Attorney A must inform Doctor that he may not participate in such communications.

**Inquiry #2:**

After the case has been called for trial and Doctor has been subpoenaed as a witness for the defense, may Attorney A accept medical records in the mail directly from Doctor?

**Opinion #2:**

Yes.

**RPC 181**

July 21, 1994

**Disqualifying Opposing Counsel by Instructing Client to Seek Consultation**

*Opinion rules that a lawyer may not seek to disqualify another lawyer from representing the opposing party by instructing a client to consult with the other lawyer about the subject matter of the representation when the client has no intention of retaining the other lawyer to represent him.*

**Inquiry #1:**

Attorney A meets with Client for a consultation about a family law matter. During the consultation, Attorney A recommends that Client set up appointments with Attorney X and Attorney Y. Attorney A advises Client to discuss his domestic case with the two other lawyers but with no intention of retaining either lawyer to represent him. The sole purpose for consulting with Attorney X and Attorney Y is to create a conflict of interest so that neither Attorney X nor Attorney Y can represent Client's spouse in the domestic action. Is it ethical for Attorney A to give this advice to his client?

**Opinion #1:**

No. Rule 7.2(A)(1) prohibits a lawyer from taking action on behalf of his client "when he knows or when it is obvious that such action . . . would serve merely to harass or maliciously injure another." Assisting a client in creating a conflict of interest in order to obstruct the opposing party's access to counsel of her choice is action that serves merely to harass the other party and is an impediment to the right of clients freely to choose counsel.

**Inquiry #2:**

Does it make a difference if Client has paid a retainer fee to Attorney A before receiving this advice?

**Opinion #2:**

No.

**Inquiry #3:**

Does it make a difference if Client, and not Attorney A, raises the issue by asking Attorney A whether he should consult with Attorney X and Attorney Y for the purpose of preventing his spouse from hiring either lawyer?

**Opinion #3:**

No. Whether the lawyer or the client first suggests this course of action, it is unethical for a lawyer to encourage his client to seek to disqualify certain lawyers from representing the opposing party.

**RPC 182**

October 21, 1994

**Disclosure of Client's Death**

*Opinion rules that a lawyer is required to disclose to an adverse party with whom the lawyer is negotiating a settlement that the lawyer's client has died.*

**Inquiry #1:**

Attorney is retained by Client to handle a slip-and-fall personal injury case of questionable liability. During the course of representation, but after Client has been treated by his doctor for injuries caused by the fall, Client dies of AIDS. Attorney continues handling the matter without informing the tortfeasor's insurance company of Client's death. Attorney's decision not to disclose the death to the insurance company is based on Attorney's belief that to do so would undermine Client's case. In addition, at least one of Client's heirs requested that Attorney not disclose the death of Client to the insurance company adjuster.

No lawsuit is ever filed, and no defense counsel is involved. Attorney negotiates a settlement with the insurance company and receives two settlement checks, both made out jointly to Attorney and the deceased Client. One check is issued under the insurance carrier's medical payments coverage, and the other under its liability coverage. At no point during the course of Attorney's representation did the insurance adjuster question whether Client was still alive or inquire about Client's current condition. Attorney never made any representations to the adjuster as to Client's current condition.

May Attorney arrange for the appointment of an administrator and have the settlement checks endorsed and deposited into Attorney's trust account, pending a decision on inquiry #2?

**Opinion #1:**

No.

**Inquiry #2:**

Is Attorney required to disclose Client's death to the tortfeasor's insurance company?

**Opinion #2:**

Yes. Rule 7.2(A)(4) prohibits a lawyer from making a false statement of law or fact in the representation of a client. In the personal injury practice area all lawyer communications with insurance company officials are directed toward the contractual resolution of a client's claim, with the client being a party to a contract, a Release. If the client dies, the lawyer no longer has a client. Only when the lawyer is subsequently retained by the deceased client's personal representative does the lawyer have a client. The identity of the client must be disclosed to the insurance company officials. The lawyer may not negotiate with insurance company officials when the lawyer has no client. To fail to disclose the identity of the client or to negotiate without a client would be to communicate a false statement of fact.

**Inquiry #3:**

If the answer to inquiry #2 is "yes," when must the disclosure be made?

**Opinion #3:**

The lawyer must disclose the death of the client to the insurance company before continuing negotiations.

**Inquiry #4:**

Do the same ethical issues apply to each check, in light of the fact that Client's death from AIDS could never impact settlement of the medical payments claim?

**Opinion #4:**

Yes. See opinion #2 above.

**Inquiry #5:**

Would it make any difference if the tortfeasor or the tortfeasor's insurance company was represented by legal counsel?

**Opinion #5:**

No.

**Inquiry #6:**

Would it make any difference if Client was a minor?

**Opinion #6:**

No.

**RPC 183**

October 21, 1994

**Role of Legal Assistant in Deposition**

*Opinion rules that a lawyer may not permit a legal assistant to examine or represent a witness at a deposition.*

**Inquiry #1:**

Is it ethical for a lawyer to permit a legal assistant to examine a witness at a deposition?

**Opinion #1:**

No. Pursuant to Rule 3.3(B) of the Rules of Professional Conduct, a lawyer having direct supervisory authority over a nonlawyer employed by a law firm must make reasonable efforts to ensure that the nonlawyer's conduct is "compatible with the professional obligations of the lawyer." Although several ethics opinions have indicated that a legal assistant or paralegal may undertake to handle certain matters such as negotiating with a claims adjuster, the opinions have all required that the legal assistant be directly supervised by the lawyer. See RPC 70, RPC 139, and RPC 152. In RPC 70, it is noted that "[u]nder no circumstances should the legal assistant be permitted to exercise independent legal judgment. . . ." In a deposition, a lawyer is required to exercise her independent legal judgment, experience, and skill from moment to moment as she formulates questions in response to the statements made by the witness, considers objections to be made to questions, and analyzes any privilege the witness may assert. Allowing a legal assistant to examine a witness at a deposition is aiding the unauthorized practice of law in violation of Rule 3.1(A), may cause substantial harm to the client's case, and is improper.

### **Inquiry #2:**

Is it ethical for a lawyer to permit a legal assistant to represent a witness at a deposition who is being deposed by the opposing counsel?

### **Opinion #2:**

No. See opinion #1.

### **Inquiry #3:**

Is it ethical for a lawyer to permit a legal assistant to represent a client who is being deposed by an opposing counsel if the legal assistant is carefully instructed in advance that his or her sole role is to ensure that the opposing counsel's examination does not go beyond specific subject matters agreed upon in advance by the lawyer and the opposing counsel?

### **Opinion #3:**

No. See opinion #1.

## **RPC 184**

October 21, 1994

### **Communications with Physician Performing Autopsy**

*Opinion rules that a lawyer for an opposing party may communicate directly with the pathologist who performed an autopsy on the plaintiff's decedent without the consent of the personal representative for the decedent's estate.*

### **Inquiry #1:**

Attorney A represents Decedent's Estate in a wrongful death case arising out of medical malpractice. An autopsy was performed on the decedent by a pathologist immediately following the decedent's death upon the authorization of the decedent's next of kin. The autopsy was performed prior to the retention of Attorney A to represent the Decedent's Estate and prior to the filing of the lawsuit.

Attorney C represents the defendant doctor and his practice group. Attorney C would like to contact the pathologist who performed the autopsy without informing or obtaining the permission of Attorney A or the personal representative of Decedent's Estate in order to discuss the pathologist's findings and conclusions regarding the decedent's death. May a lawyer contact the pathologist who performed an autopsy on a decedent whose medical treatment while living is the subject matter of a wrongful death case without the consent of the lawyer for the decedent's estate or the personal representative of the estate?

### **Opinion #1:**

Yes, unless otherwise prohibited by statute or case law. The public policy of protecting a patient's right to privacy regarding his or her medical treatment is furthered by the prohibition on communications with a plaintiff's non-party treating physician if the communications are by means other than the recognized methods of discovery in a civil lawsuit. See *Crist v. Mofatt*, 326 NC 326, 389 SE 2d 41 (1990) and RPC 162. However, the public policy interest in protecting a patient's right to privacy about

his or her medical treatment is not relevant to an autopsy performed after the patient's death by a physician who is not providing the decedent with medical treatment. See *Prince v. Duke University*, 326 NC 787 (1990).

### **Inquiry #2:**

Does the answer to this question change if the decedent's autopsy was ordered by the medical examiner rather than her next of kin?

### **Opinion #2:**

No, see opinion #1 above.

## **RPC 185**

October 21, 1994

### **Ownership of Stock in Title Insurance Agency**

*Opinion rules that a lawyer who owns any stock in a title insurance agency may not give title opinions to the title insurance company for which the title insurance agency issues policies.*

### **Inquiry:**

Attorney A has been invited to purchase shares of stock in a new North Carolina corporation to be called "Title Agency." Pursuant to a written contract, Title Agency will be an agent of Title Insurer for the purpose of issuing title policies and title commitments. Title Agency will do business in conformity with NCGS 58-27-5 and will comply with the prohibition on the unauthorized practice of law set forth in Chapter 84 of the General Statutes. Attorney A will give Title Insurer title opinions regarding transactions for which Attorney A acts as the closing lawyer. Attorney A is not an agent of Title Insurer and will not be an employee of Title Agency or a person holding a license pursuant to Chapter 58 of the General Statutes.

Attorney A would like to acquire stock in Title Agency without violating the requirements of CPR 101 or engaging in any other unethical conduct. What percentage of the shares of stock of Title Agency may Attorney A acquire without violating the Rules of Professional Conduct?

### **Opinion:**

CPR 101 held that it is unethical for a lawyer who owns a substantial interest, directly or indirectly, in a title insurance company, agency, or agent, who acts as a lawyer in a real estate transaction insured by such title insurance company or through such agency or agent, to receive any commission, fee, salary, dividend, or other compensation or benefit from the title insurance company, agency, or agent, regardless of whether the ownership interest is disclosed to the client for whom the services are performed.

CPR 101 was based on the Code of Professional Responsibility which has been supplanted by the Rules of Professional Conduct. Rule 5.1(B) now governs potential conflicts of interest between a lawyer's own interests and the representation of a client. The rule disqualifies a lawyer from representing a client if the representation of the client may be materially

limited by the lawyer's own interests unless: 1) the lawyer reasonably believes that the representation will not be adversely affected; and 2) the client consents after full disclosure.

CPR 101 authorized a lawyer who owns an insubstantial interest in a title insurance agency to render title opinions to the title insurer and to receive compensation from the title insurance agency in the form of dividends or otherwise. Even an insubstantial interest in a title insurance agency, however, could materially impair the judgment of a closing lawyer. RPC 49 addresses a closing lawyer's duty to his or her client when the lawyer owns shares in a realty firm that will realize a commission upon the closing of the transaction. RPC 49 states that the conflict of interest is too great to be allowed even if the client wishes to consent. This conflict is also present when a title agency, and, therefore, indirectly the closing lawyer who owns an interest in the title agency, will receive compensation from the client as a result of the closing of the transaction. The lawyer's personal interest in having the title insurance agency receive its compensation could conflict with the lawyer's duty to close the transaction only if it is in the client's best interest.

This opinion does not prohibit a lawyer from owning stock in a publicly traded title insurance company.

## **RPC 186**

[Editor's Note: This opinion was continued for further consideration. Check *Newsletter*, vol. 20, no. 2, *et seq.* for final opinion.]

## **RPC 187**

October 21, 1994

### **Proprietary Interest in Domestic Client's Support Payments**

*Opinion rules that a lawyer may not acquire a proprietary interest in the subject matter of domestic litigation by obtaining a client's authorization to instruct the clerk of superior court to forward the client's support payments to the lawyer to satisfy the client's legal fees.*

### **Inquiry:**

Attorney has a fee agreement that he would like to use with his clients. In the agreement, the client promises to pay Attorney a "non-refundable retainer fee" which "shall become the sole property of Attorney." Pursuant to the agreement, the services of Attorney are to be charged at \$125 per hour. The retainer will be applied against accrued legal fees until the retainer is exhausted. The excess amount will then be billed on a monthly basis. The agreement further provides that in the event the legal matter is settled or there is a reconciliation in a domestic action, Attorney shall keep the "retainer fee" unless Attorney withdraws from the representation of the client. In the event Attorney withdraws, the agreement provides that At-

torney will be compensated for the actual time spent on the legal matter at Attorney's regular hourly rate and any portion of the "nonrefundable retainer fee" in excess of this amount shall be refunded to the client. The agreement also contains the following provision:

In matters pertaining to alimony and/or child support, in the event of nonpayment of fees as provided in paragraph 5 herein, I hereby authorize Attorney to direct the clerk of superior court to forward all alimony and/or child support payments for my benefit to the offices of Attorney until such time as my bill is paid in full. I further authorize Attorney, or his agent, to endorse any alimony and/or child support checks so forwarded in my name such that said check(s) may be deposited in the bank trust account of Attorney. Attorney and I agree that he may withdraw and apply up to 50 percent of any such payments deposited in his trust account for application to any past due account balance, with the balance paid to me.

Are the provisions of the agreement in compliance with the Rules of Professional Conduct?

**Opinion:**

No. The provision of the agreement authorizing the clerk of court to pay the client's alimony and/or child support payments directly to Attorney in the event that the client's legal fees are unpaid violates Rule 5.3(A) of the Rules of Professional Conduct. This provision essentially gives Attorney a security interest in the client's child support and/or alimony payments which Attorney has been hired to pursue. Rule 5.3(A) prohibits a lawyer from acquiring a proprietary interest in the subject matter of the litigation he is conducting for a client except that he may (1) acquire a lien granted by law to secure his fee, or (2) contract with a client for a reasonable contingent fee in civil cases. The exception allowing a lawyer to secure a fee by asserting a lien granted by law does not apply in this situation because statutory liens do not arise by contractual agreement between a lawyer and a client. See Chapter 44A. The purpose of the prohibition on acquiring an interest in the subject matter of litigation is to prevent a lawyer from having a personal financial stake in the outcome of the case which may adversely affect the lawyer's professional judgment. In the instant case, Attorney's security interest in the future child support and/or alimony payments of his client may cloud his professional judgment with regard to the negotiation and resolution of the domestic dispute including the issue of the client's right to and the amount of child support and alimony.

With regard to the other provisions of the fee contract, lawyer may charge a client an advance fee against which future services will be billed and may pay the money to himself immediately if the client agrees the fee is earned immediately. See RPC 158. The agreement in the present inquiry should fully disclose to the client

and the client should explicitly agree that the advance fee (which the agreement incorrectly describes as a "nonrefundable retainer," see RPC 50) will be paid to Attorney immediately and not held in Attorney's trust account for the possible refund of any excess balance at a later date. It should be noted that despite the provision of the agreement stating that the excess balance will be refunded only if Attorney withdraws, if a lawyer's services are terminated, any portion of the fee that is clearly excessive may be refundable to a client whether the fee is deposited in the trust account or the operating account. See RPC 158.

## RPC 188

January 13, 1995

[Editor's Note: This opinion was originally published as RPC 188 (Revised).]

### Receipt of Commission by Relative of Closing Lawyer

*Opinion rules that a lawyer may close a real estate transaction brokered by the lawyer's spouse with the consent of the parties to the transaction.*

#### Inquiry #1:

Lawyer practices law with XYZ Law Firm. His wife, W, is a real estate agent with Real Estate Agency located in a neighboring city. From time to time, members of XYZ Law Firm have been asked to represent one of the parties to a real estate transaction brokered by W or another realtor with Real Estate Agency and from which W or another realtor with Real Estate Agency will receive a commission. If all parties to the closing are made aware of the marital relationship between Lawyer and W, may Lawyer represent any party to a real estate transaction brokered by W?

#### Opinion #1:

Yes. There is no conflict of interest if a lawyer represents only the seller in a real estate transaction brokered by his wife because the interests of the seller and the real estate broker are the same: both want to ensure that the transaction is consummated promptly. With regard to his representation of the buyer and/or the lender, who are, respectively, interested in assuring that the buyer gets the property he bargained for and the loan to the buyer is properly documented and secured, Lawyer must first consider whether the exercise of his independent, professional judgment on behalf of his client (or clients) will be "materially impaired" by his desire to advance the interests of his spouse who will receive a valuable commission only if the transaction goes forward. Rule 5.1(B); see also RPC 88. If Lawyer reasonably believes his judgment will not be adversely affected by his relationship with his wife and all clients consent to Lawyer's participation after full disclosure of this relationship and the risks involved, Lawyer may proceed with the representation. On the other hand, if Lawyer concludes that his judg-

ment on behalf of the buyer and/or the lender will be adversely affected by his desire to financially benefit his wife, it would be a disqualifying conflict of interest.

#### Inquiry #2:

Are the other lawyers in XYZ Law Firm disqualified from representing a party to a real estate transaction brokered by W?

#### Opinion #2:

No, if Lawyer could reasonably conclude that his judgment on behalf of the client would not be adversely affected under the circumstances and the client consents after full disclosure, then no conflict would be imputed to the other lawyers in XYZ Law Firm. See Rule 5.1(B) and Rule 5.11(A).

#### Inquiry #3:

May Lawyer represent the parties to a real estate closing if the transaction was brokered by a real estate agent affiliated with Real Estate Agency other than W?

#### Opinion #3:

Yes. See opinion #1 above. If Lawyer concludes that his independent professional judgment on behalf of the buyer or lender might be affected by the desire to benefit Real Estate Agency, with whom W is affiliated, or her fellow real estate agent at Real Estate Agency, it would be a disqualifying conflict of interest.

#### Inquiry #4:

Real Estate Developer has been a client of XYZ Law Firm for several years and insists that the deeds for lots in the subdivisions it is developing be prepared by a member of XYZ Law Firm in order to ensure accuracy and uniformity. If W brokers a transaction for a lot in one of Developer's subdivisions, may Lawyer or another lawyer with XYZ Law Firm prepare the deed and sale papers for Developer?

#### Opinion #4:

Yes. See opinion #1 above.

#### Inquiry #5:

In a real estate transaction under contract, but not closed, W acted as realtor for the seller. Before closing, legal problems relating to the land arose which required additional legal services beyond those usually required for a standard real estate closing. May Lawyer or another lawyer with XYZ Law Firm represent the seller on this matter?

#### Opinion #5:

Yes. See opinion #1 above.

#### Inquiry #6:

W is also a paralegal and she sometimes assists her husband by performing his clerical work at her desk at the offices of Real Estate Agency. Lawyer represents Client on her claim for damages arising out of a traffic collision with another car. Ms. S, the driver/owner of the other automobile involved in the accident, works as a real estate agent with W at Real Estate Agency. Lawyer has not discussed Client's claim with Ms. S and is negotiating only with the insurance carrier. Lawyer advised Client that Ms. S works with W and offered the names

of other lawyers in the area if Client chose to get a different lawyer. Does Lawyer need to do anything else to avoid a conflict of interest?

**Opinion #6:**

Yes. Although Lawyer could reasonably conclude that his representation of Client will not be impaired by the relationship between Ms. S and his wife, he has a duty to ensure that the confidential information of Client is not accidentally revealed to Ms. S. See Rule 4(B)(1). If W is working on any of the documents that relate to Client's claim at her desk in the offices of Real Estate Agency, there is a substantial risk that confidential information of Client may be revealed to Ms. S.

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## RPC 189

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October 21, 1994

### Communications by DA's Staff with Unrepresented Traffic Violators

*Opinion rules that the members of a district attorney's staff may not give legal advice about pleas to lesser included infractions to an unrepresented person charged with a traffic infraction.*

**Inquiry:**

In County X, when a citizen receives a traffic citation, he or she is often told by the police officer or state trooper making the stop to call the district attorney's office directly in order to get the charge reduced or to get a prayer for judgment continued. If the citizen subsequently calls or goes to the district attorney's office, he or she will speak with an assistant district attorney, a victim/witness coordinator, or a secretary. The member of the district attorney's staff counsels the citizen about pleas to lesser infractions available to the citizen which will reduce insurance points and save the citizen money on his or her insurance premiums. If relevant, the staff member might also give the citizen advice about pleas that would prevent a forfeiture of the citizen's driver's license. Following the discussion, a Form CR-202 from the Administrative Office of the Courts entering the citizen's guilty plea to a lesser included infraction, is prepared for the citizen. Is the practice of advising citizens as to their plea options allowed under the Rules of Professional Conduct?

**Opinion:**

No. An assistant district attorney or nonlawyer member of the district attorney's staff who is supervised by the district attorney may not give legal advice to a citizen charged with a traffic infraction who is not represented by a lawyer. The district attorney and his or her legal staff represent the State of North Carolina when they negotiate a traffic citation against a citizen. Where the interests of an unrepresented person and the interests of a lawyer's client are in conflict, Rule 7.4(B) and Rule 7.4(C) prohibit the lawyer from (1) giving advice to the unrepresented person other than the advice to seek counsel and (2) implying that the lawyer is dis-

interested. If the lawyer knows or should know that the unrepresented person misunderstands the lawyer's role, the lawyer must make reasonable efforts to correct the misunderstanding. Rule 7.4(C). In addition, Rule 7.3(B) imposes upon a prosecutor a special duty to advise unrepresented individuals who are charged in a criminal matter of the individual's right to obtain counsel. The district attorney and the other lawyers in his or her office must make reasonable efforts to ensure that the conduct of non-lawyer members of the staff is compatible with the professional obligations of the lawyers not to give legal advice to an unrepresented citizen charged with an infraction. See Rule 3.3(B). The foregoing opinion does not prohibit a member of a district attorney's staff from responding to questions from an unrepresented citizen regarding the pleas the district attorney's office would be willing to approve.

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## RPC 190

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October 21, 1994

### Billing for Reused Work Product

*Opinion rules that a lawyer who has agreed to bill a client on the basis of hours expended may not bill the client on the same basis for reused work product.*

**Inquiry #1:**

A lawyer with Law Firm researched a legal issue for Client A. Client A was billed for the work by Law Firm and paid the bill. Client B is also a client of Law Firm. Client B's legal matters are totally unrelated to those of Client A. However, the legal research which was prepared for Client A is relevant to Client B's legal matter and if Law Firm had not previously researched the particular legal issue and preserved the prior research, it would be necessary to research the issue again for Client B. Client B and Law Firm agreed that Client B would be billed at an hourly rate for each hour expended by one of Law Firm's lawyers doing work on Client B's behalf. May the research originally prepared for Client A be reused and Client B billed for the research?

**Opinion #1:**

No. A lawyer who has agreed to bill a client on the basis of hours expended does not fulfill her ethical duty if she bills the client for more time than was actually expended on the client's behalf.

The comment to Rule 2.6 of the Rule of Professional Conduct, the rule that regulates legal fees, states, "[o]nce a fee contract has been reached between attorney and client, the attorney has an ethical obligation to fulfill the contract and represent the client's best interest regardless of whether he has struck an unfavorable bargain." A lawyer also has a duty to deal honestly with clients. See Rule 1.2(C). Implicit in an agreement with a client to bill at an hourly rate for hours expended on the client's behalf is the understanding that for each hour of

work billed to the client, an hour's worth of work was actually performed. If a lawyer who has agreed to accept hourly compensation for her work subsequently bills the client for reused work product, the lawyer would be engaging in dishonest conduct in violation of Rule 1.2(C).

However, the lawyer may bill at an hourly rate for the time expended tailoring old work product to the needs of a new client, and the lawyer is also free, with full disclosure, to suggest to a client that additional compensation would be appropriate because the lawyer was able to reuse prior work product for the client's benefit. Moreover, it is not unethical to charge for the value of reused work product if the original fee agreement with the client or any renegotiated fee agreement includes the express understanding that the client will be charged a reasonable fee, which is not based upon hourly compensation, for the reused work product.

**Inquiry #2:**

If the answer to inquiry #1 is affirmative, may Law Firm charge Client B at the same rate that it charged Client A for the service?

**Opinion #2:**

No. See opinion #1 above.

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## RPC 191

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[Editor's Note: This opinion was continued for further consideration. Check *Newsletter*, vol. 20, no. 2, *et seq.* for final opinion.]

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## RPC 192

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January 13, 1995

### Use of Information Obtained from Illegal Tape Recording

*Opinion rules that a lawyer may not listen to an illegal tape recording made by his client nor may he use the information on the illegal tape recording to advance his client's case.*

**Inquiry #1:**

Attorney represents Client W in a contested domestic matter involving allegations of adultery. Client W, without the knowledge or consent of Attorney, illegally tape records a conversation between Client W's Spouse and Spouse's paramour. Attorney advises Client W that tape recording the conversation was illegal and should not be repeated. The tape recording is inadmissible in court but may be admitted for purposes of impeaching Spouse and his paramour. May Attorney ethically listen to the illegal tape recording in order to be aware of its content in the event Spouse makes a statement in court that can be impeached with the tape recording?

**Opinion #1:**

No. The tape recording is the fruit of Client W's illegal conduct. If Attorney listens to the tape recording in order to use it in Client W's representation, he would be enabling Client W to benefit from her illegal conduct. This would be prejudicial to the administration of justice in

violation of Rule 1.2(D). See also Rule 7.2(A)(8). Attention is directed to the Federal Wiretap Act, 18 U.S.C. Section 2510, *et seq.*; particularly Sections 2511 and 2520, regarding criminal penalties for endeavoring to use or using the contents of an illegal wire communication.

**Inquiry #2:**

If Attorney may listen to the tape recording, may he use the information obtained from the tape recording to gather additional evidence?

**Opinion #2:**

No. See opinion #1.

**Inquiry #3:**

If Attorney may listen to the tape recording, may he use the information acquired from the tape recording to form questions to be asked to Spouse and Spouse's paramour at the trial?

**Opinion #3:**

No. See opinion #1.

## RPC 193

January 13, 1995

### Communications with Uninsured Motorist

*Opinion rules that the attorney for the plaintiffs in a personal injury action arising out of a motor vehicle accident may interview the unrepresented defendant even though the uninsured motorist insurer, which has elected to defend the claim in the name of the defendant, is represented by an attorney in the matter.*

**Inquiry #1:**

Attorney A represents Plaintiffs in a civil action instituted against Defendant for damages arising out of a motor vehicle accident. Defendant has no motor vehicle insurance and is not represented by a lawyer. Attorney B represents the uninsured motorist insurer ("Insurer") which is defending the claim in the name of the defendant without being named as a party pursuant to NCGS. Section 20-279.21(b)(3)a. May Attorney A speak to Defendant without Attorney B's knowledge or consent?

**Opinion #1:**

Yes. Rule 7.4(A) of the Rules of Professional Conduct only prohibits communication with a person known to be represented by counsel in regard to the matter in question. Although G.S. 20-279.21(b)(3)a. allows an insurer to defend in the name of an uninsured motorist, the attorney for the insurer does not represent that individual. For that reason, Attorney A need not obtain the consent of Attorney B in order to interview Defendant. However, in dealing with Defendant, who is unrepresented in this matter, Attorney A must comply with the requirements of Rule 7.4(B) and (C) which prohibit a lawyer from giving advice to an adverse party who is not represented by a lawyer, other than the advice to secure counsel, and also prohibits such a lawyer from stating or implying that he or she is disinterested.

**Inquiry #2:**

There is motor vehicle insurance covering the vehicle driven by Defendant in the accident but the limits of liability are inadequate to compensate Plaintiffs. The motor vehicle insurer providing primary liability on the underinsured vehicle driven by Defendant pays the limits of liability and, upon application to the court pursuant to G.S. 20-279.21(b)(4), is released from further liability and the obligation to provide a defense. Defendant is therefore unrepresented. The underinsured motorist insurer (represented by Attorney B) is defending the action in the name of Defendant pursuant to G.S. 20-279.21(b)(4). May Attorney A communicate with Defendant without Attorney B's knowledge or consent if Plaintiffs release Defendant from personal liability?

**Opinion #2:**

Yes. See opinion #1.

## RPC 194

January 13, 1995

### Communications with Unrepresented Prospective Defendant

*Opinion rules that in a letter to an unrepresented prospective defendant in a personal injury action, the plaintiff's lawyer may not give legal advice nor may he create the impression that he is concerned about or protecting the interests of the unrepresented prospective defendant.*

**Inquiry:**

Plaintiff and Defendant were involved in an automobile accident. Plaintiff retained Attorney to represent her. Attorney attempted to negotiate a settlement with Defendant's liability insurance carrier without success. Attorney decided to file suit. Prior to filing the complaint and serving the complaint on Defendant, Attorney wants to send Defendant, who is unrepresented, a letter. The letter will inform Defendant that Attorney represents Plaintiff in connection with the accident and that Attorney attempted to settle the case with the carrier. The letter will include the following statement:

Such a settlement would avoid litigation and would avoid even the possibility that you might have personal exposure for payment of part of a judgment, should you have insufficient liability insurance to cover a judgment. The letter will also indicate that the insurance carrier either failed to negotiate or was unwilling to pay what Attorney believed to be a fair settlement and that "this means we must sue you on behalf of our client." The letter will advise Defendant to contact his insurance adjuster upon receiving the suit papers. The letter will then state the following:

Please understand that nothing personal is intended by this action. It has become necessary because we have been unable to settle the case with your insurance carrier.

The letter will recommend that Defendant consult a lawyer of his own choosing if Defendant has only minimum liability insurance coverage. The letter will conclude with the following statement:

Although the insurance company will hire a lawyer to defend this claim, his or her responsibility will be divided between you and the insurance company. Sometimes, your interests and that of the insurance company are not the same.

Will the content of this letter violate the Rules of Professional Conduct?

**Opinion:**

Yes. Rule 7.4(B) prohibits a lawyer from giving advice to a prospective opposing party who is not represented by a lawyer, other than the advice to secure counsel. In the letter, the advice to secure counsel is given not in an attempt by Attorney to avoid a conflict of interest on his own part but in the context of giving Defendant legal advice about a possible conflict of interest on the part of any lawyer who may be retained by the insurance carrier to defend Defendant. The letter also gives the unrepresented Defendant advice about the effect of a settlement on his personal liability.

More problematic is the general tenor of the letter which, through numerous statements such as "nothing personal is intended by this action," implies that Attorney is not only disinterested but he is actually concerned about and protecting the interests of Defendant. This is a clear violation of Rule 7.4(C) which states

... in dealing on behalf of a client with a person who is not represented by counsel, [a lawyer shall not] state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

## RPC 195

January 13, 1995

### Disclosure of Confidential Information of Personal Representative of an Estate

*Opinion rules that the attorney who represented an estate and the personal representative in her official capacity may divulge confidential information relating to the representation of the estate and the personal representative to the substitute personal representative of the estate.*

**Inquiry #1:**

Attorney A was consulted by Widow after her husband's death in an automobile accident. At the time of the consultation, Widow had not qualified as personal representative of her husband's estate. Attorney A advised Widow about the handling of her husband's estate, the estate's possible liability to another person injured in the automobile accident that killed her husband, and how the liability of the estate

might affect her and her children's inheritance. Widow qualified as personal representative of the estate and commenced the administration of the estate without the assistance of Attorney A. Before the time for filing claims against the estate expired and before the person injured in the accident filed a claim against the estate, Widow disbursed most of the assets of the estate to herself and her children. Ultimately, Widow was removed as personal representative and Attorney B was appointed in her place. Attorney B is preparing a suit against Widow and the children in which he will seek to restore the assets of the estate. He would like to interview Attorney A about the substance of any consultations Attorney A had with Widow and any of the heirs regarding her duties as personal representative of her husband's estate. Attorney B would also like to see Attorney A's file for Widow. Does Attorney A have a duty of confidentiality to Widow that prohibits him from opening his file to Attorney B and being questioned by Attorney B about the advice he gave Widow with regard to the administration of the estate?

#### Opinion #1:

Yes. At the time of her consultation with Attorney A, Widow had not qualified as personal representative. Therefore, Attorney A was not representing the estate or the personal representative in her official capacity. Any disclosure by Attorney A of information gained during his professional relationship with Widow which would result in embarrassment or harm to Widow would be a violation of Attorney A's duty to preserve the information of his client. Rule 4(A).

#### Inquiry #2:

Would the answer to inquiry #1 be different if Widow sought the legal advice of Attorney A in her official capacity as personal representative of her husband's estate?

#### Opinion #2:

Yes. RPC 137 states that "[i]n accepting employment in regard to an estate, an attorney undertakes to represent the personal representative in his or her official capacity and the estate as an entity." If Attorney A was representing Widow in her official capacity as the personal representative of the estate, Attorney B, as the substitute personal representative, may consent to the release of the file by Attorney A and the divulging of confidential communications between Attorney A and Widow. When a lawyer represents a personal representative of an estate in his or her official capacity, the duty of confidentiality is owed to the personal representative acting in his or her official capacity and to the estate itself. Whomever is serving as personal representative of the estate, including a substitute personal representative, may consent to the disclosure of confidential information relating to the representation of the estate and the personal representative.

#### Inquiry #3:

If Attorney A gave legal advice to Widow both personally, prior to her appointment as personal representative, and, subsequently, as the personal representative of the estate, would Attorney A have a duty of confidentiality prohibiting him from opening the estate file to Attorney B and prohibiting him from divulging his communications with Widow in her capacity as personal representative of the estate?

#### Opinion #3:

No. Attorney A may open the estate file to Attorney B and may divulge to Attorney B the substance of his communications with Widow when he was representing Widow in her capacity as personal representative. However, information obtained from Widow during the time that Attorney A represented her in her personal capacity would be subject to the duty of confidentiality. See opinion #2.

### RPC 196

January 13, 1995

#### Recovering Legal Fees from Opposing Party

*Opinion rules that a law firm may not charge a clearly excessive fee for legal representation even if the legal fee may be recovered from an opposing party.*

#### Inquiry:

Law Firm has considerable experience in the practice of community association and planned community law. Over time, Law Firm has established certain fees for collection activities provided to its association clients. These collection activities include the prosecution of liens, foreclosures, and bankruptcy proceedings. Law Firm has determined that the fees it charges for these collection activities are reasonable based upon the time and labor required; the difficulty of the questions involved; the skill required to perform the legal service; the experience, reputation, and ability of the lawyers providing the services; and the customary fee for like work in the same locality. Where possible and permitted by law, Law Firm recovers attorney's fees and expenses incurred in connection with these collection activities from the responsible debtor. All fees not recovered are paid by the client association that retained Law Firm to pursue the action.

Manager of Association X has requested that Law Firm agree to substantially increase the legal fees it charges to debtors from whom fees are recovered and to agree not to bill Association X on cases where fees are not recovered from the debtor. Association X would continue to pay expenses incurred by Law Firm in connection with the collection activity. No part of the monies recovered by Law Firm for Association X would be paid to Law Firm as a contingent fee. Is this fee arrangement ethical?

#### Opinion:

No. Essentially, the fee arrangement requires Law Firm to offset the losses it may realize on

cases where legal fees cannot be collected from the debtor by inflating fees in the cases where it is able to recover fees from the debtor. Rule 2.6(A) prohibits a lawyer from charging or collecting a clearly excessive fee. Subsection (B) of Rule 2.6 sets forth certain factors to be taken into consideration in determining the reasonableness of a fee including, but not limited to, the following: (1) the time and labor required and the skill involved; (2) whether the acceptance of particular employment will preclude other employment; (3) fees customarily charged in the same locality; (4) the results obtained; (5) time limitations; and (6) whether the fee is fixed or contingent. If Law Firm collects more than the fee that it has already determined to be reasonable for the services rendered to Association X after taking into account the factors set forth in Rule 2.6(B), Law Firm would be charging and collecting an unethical excessive fee whether the fee is collected from Association X or an opposing party. In addition, if Law Firm inflates its fee in a request to a court and/or a demand to a debtor for recovery of legal fees, Law Firm would be engaging in misrepresentation of the actual fees incurred for that particular collection action in violation of Rule 2.1(C) which prohibits a lawyer from engaging in conduct involving dishonesty, deceit, or misrepresentation.

### RPC 197

January 13, 1995

#### Prosecutor's Duty to Notify Appropriate Persons of Dismissal of Criminal Charges

*Opinion rules that a prosecutor must notify defense counsel, jail officials, or other appropriate persons to avoid the unnecessary detention of a criminal defendant after the charges against the defendant have been dismissed by the prosecutor.*

#### Inquiry #1:

Defendant is being held in pretrial detention because he is unable to make bond. He is represented by Defense Lawyer. Prosecutor files a notice of voluntary dismissal of all charges pending against Defendant, pursuant to NCGS. Section 15A-931, without placing the case on a published trial calendar. Prosecutor has access to a list of persons held in jail and the charges under which they are being held. This list includes an entry for Defendant. Is Prosecutor required by the Rules of Professional Conduct to serve Defense Lawyer with a copy of the written dismissal?

#### Opinion #1:

Yes, the prosecutor is required to either serve Defense Lawyer with a copy of the written dismissal or take other steps to notify Defense Lawyer, jail officials, or other appropriate persons in order to avoid the unnecessary detention of Defendant.

A lawyer has a duty to avoid conduct that is prejudicial to the administration of justice pursuant to Rule 1.2(D) of the Rules of Professional

Conduct. Prosecutors have a special duty "to seek justice, not merely to convict." See comment to Rule 7.3. In particular, Rule 7.3(D) requires a prosecutor to make timely disclosure to the defense of all evidence or information that tends to negate the guilt of the accused or mitigate the offense. The spirit, if not the letter of these rules, when considered *in pari materia*, calls for a prosecutor to take reasonable steps to ensure that a criminal defendant is not held in jail without charge.

**Inquiry #2:**

Is Prosecutor required by the Rules of Professional Conduct to provide the jail with a certified copy of the dismissal?

**Opinion #2:**

See opinion #1 above.

**Inquiry #3:**

Would the response to inquiry #2 be different if Defendant was unrepresented?

**Opinion #3:**

No. See opinion #1 above.

## RPC 198

January 13, 1995

### Responsibilities of Stand-by Counsel Upon the Assumption of the Defense in a Capital Case

*Opinion explores the ethical responsibilities of stand-by defense counsel who are instructed to take over the defense in a capital murder case without an opportunity to prepare.*

**Inquiry #1:**

Defendant chose to defend himself in the trial of a capital murder charge. Several months prior to the trial, the court appointed Attorney A and Attorney B as stand-by defense counsel. The stand-by counsel were present at all pretrial hearings. At the time of the appointment and at other points during the trial, Attorney A and Attorney B were advised that if Defendant decided at any point that he did not want to proceed *pro se*, they would take over his defense. When Attorney A and Attorney B were advised that they could be elevated from stand-by counsel to trial counsel for Defendant at any time, they objected unless they would be given adequate time to prepare.

At numerous hearings prior to the trial, Defendant was offered the opportunity to have stand-by counsel take over his defense. Defendant refused each time and proceeded to represent himself throughout the "guilt/innocence phase" of the trial. A guilty verdict was returned by the jury. After the State completed the presentation of its evidence during the sentencing phase and after Defendant had called several witnesses, Defendant advised the court that he wanted stand-by counsel to handle the presentation of the remainder of his case. The court advised Attorney A and Attorney B to proceed with the presentation of Defendant's evidence in the sentencing phase of the trial. Attorney B advised the court that he and Attorney A were

unprepared to proceed at that time because, in their role as stand-by counsel, they had not interviewed the witnesses subpoenaed by Defendant nor had they had any discussions with Defendant regarding the substantive aspects of his case. Attorney B also advised the court that there were other aspects of the case, including appropriate motions which might be made during the sentencing phase, which required investigation and research. Attorney A and Attorney B filed a motion for a three-week continuance to prepare the presentation of Defendant's case in the sentencing hearing, and they also filed a motion for a new sentencing hearing.

The court denied both motions. Attorney A and Attorney B made motions to withdraw on the grounds that they could not effectively represent Defendant without preparation. The motions to withdraw were denied. Attorney A and Attorney B filed petitions for writs of superseas and mandamus and an application for stay of proceedings with the North Carolina Supreme Court but the Supreme Court had not ruled at the time the trial court ordered Attorney A and Attorney B to proceed with the defense. Is it unethical for Attorney A and Attorney B to fail to present a defense in the sentencing hearing?

**Opinion #1:**

No, provided Attorney A and Attorney B made every effort to be adequately prepared, but reasonably and in good faith, concluded that under the circumstances they could not present a competent defense.

Rule 6(A)(2) of the Rules of Professional Conduct provides that a lawyer shall not handle a legal matter "without adequate preparation under the circumstances." The comment to Rule 6 notes "[t]he required attention and preparation [for the competent handling of a particular matter] are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence." Certainly the sentencing phase of a capital murder trial requires the utmost preparation. A lawyer who is serving as stand-by counsel to a criminal defendant has a duty to competently represent the defendant at that juncture in the trial at which he is instructed to take over the defense. If that lawyer reasonably and in good faith concludes that he has not had an adequate opportunity to prepare under the circumstances, at a minimum he should advise the court and request a continuance in order to have the opportunity to prepare. Additionally, he may make a motion to withdraw from the representation. See Rule 2.8(B)(2). If the court determines that the lawyer should proceed without a continuance and does not allow the lawyer to withdraw, the lawyer should exhaust all reasonably available legal procedures by which he might seek additional time to prepare. However, having exhausted such avenues, if the lawyer continues, reasonably and in good faith, to believe that his

lack of preparation makes him incompetent to present a defense, it is not unethical for the lawyer to decide not to present a defense. By declining to present a defense the lawyer must not be irresponsibly abandoning his client but must believe that under the circumstances and given the limited time available, even if he made heroic efforts to prepare himself, he would be unable to present a competent defense.

**Inquiry #2:**

After the motion for a continuance was denied, would it have been unethical for Attorney A and Attorney B to present a defense?

**Opinion #2:**

No. If after being put on notice that a lawyer believes himself to be incompetent to proceed without additional time to prepare, the court determines that the lawyer is adequately prepared and denies a motion to continue, it is not unethical for the lawyer to proceed with the representation on this basis.

**Inquiry #3:**

May a lawyer refuse to present a defense for a criminal defendant for the purpose of creating grounds for a post-trial ineffective assistance of counsel motion?

**Opinion #3:**

No. A lawyer may not pursue a course of conduct that would intentionally prejudice or damage his client nor may he engage in conduct that is prejudicial to the administration of justice. Rule 7.1(A)(3) and Rule 1.2(D). A lawyer may not intentionally present an inadequate or ineffective defense of a criminal defendant for the primary purpose of creating error and assuring his client a new trial.

## RPC 199

January 13, 1995

### Ethical Responsibilities of Court-Appointed Lawyer

*Opinion addresses the ethical responsibilities of a lawyer appointed to represent a criminal defendant in a capital case who, in good faith, believes he lacks the experience and ability to represent the defendant competently.*

**Inquiry #1:**

Attorney A was appointed by a district court judge to serve as lead counsel in defending an indigent defendant ("Defendant") against a charge of first-degree murder. Attorney A is licensed to practice in North Carolina but has limited experience in representing criminal defendants. He practices law in a rural area without a sufficient library and other resources appropriate for the ongoing legal research necessary for a capital case. Attorney A believes he is not competent to represent a client in a capital murder case. He has never been on any court list for appointment to represent indigent defendants.

Attorney A filed a motion to withdraw with the district court which advised the court that he did not believe he was competent to provide le-

gal representation in such a matter. After a hearing, the district court concluded that Attorney A is competent and denied the motion to withdraw. Attorney A in good faith still believes that he is not competent to represent Defendant. Is it ethical for Attorney A to take additional steps to legally challenge the appointment?

**Opinion #1:**

Yes. Rule 6 of the Rules of Professional Conduct provides that a lawyer shall not handle a legal matter that he knows he is not competent to handle unless he can associate an experienced lawyer to assist him. If a lawyer who is appointed to represent an indigent criminal defendant honestly and reasonably concludes that he is not competent to represent the client, at a minimum, he has a duty to advise the court of his perceived lack of competency, as Attorney A did in the preceding inquiry. If the court determines that the lawyer is competent but the lawyer in good faith continues to believe that he is not competent and his representation would be harmful to the client's interests, it is not unethical for the lawyer to challenge the appointment by appropriate legal procedures, including but not limited to, making a motion to have the appointment set aside in superior court, filing a petition for certiorari with the appellate courts or appealing a contempt ruling for refusal to serve. If the lawyer controverts his appointment through such legal proceedings, he must be acting in good faith and not merely to avoid the inconvenience or expense of the appointment. See Rule 7.2(A)(1).

Although the lawyer has an initial duty to advise the court that he believes he is not competent to handle a matter, if the court nevertheless determines that the lawyer is competent and refuses to release the lawyer from the appointment, it is not unethical for the lawyer to proceed with the representation on this basis without further challenge to the appointment.

**Inquiry #2:**

Is it ethical for Attorney A to refuse to serve as appointed counsel for Defendant and accept the court's sanction?

**Opinion #2:**

Yes, if Attorney A has unsuccessfully challenged the appointment through reasonably available legal procedures and he continues, as a matter of professional responsibility, to believe that he is not competent to serve as legal counsel to Defendant, it is not unethical for Attorney A to refuse to serve and to accept the court's sanction. See Rule 6(A)(1).

**Inquiry #3:**

Would the responses to inquiry #1 or inquiry #2 be different if Attorney A is appointed to assist another experienced lawyer who will serve as lead counsel?

**Opinion #3:**

Yes. Whether Attorney A is appointed lead counsel or appointed to assist an experienced lawyer would be relevant to the assessment of Attorney A's competency to represent Defen-

dant. As noted in Rule 6, a lawyer may consider himself competent to handle a legal matter he would otherwise not be competent to handle if he associates an experienced lawyer to assist him with the matter. If Attorney A is serving as "second chair" to an experienced lawyer, it would not be reasonable for him to conclude that he is not competent to handle the matter.

**Inquiry #4:**

Attorney A's malpractice insurer has expressed concern that Attorney A's representation of Defendant in the capital case may present an unreasonable risk of exposure to a malpractice claim, particularly since it would require Attorney A to practice in an area outside his chosen areas of concentration. If Attorney A represents Defendant, he believes he should make a record that will document his own lack of competence in order to preserve a due process or other constitutional challenge to the state system of appointing attorneys for indigent defendants charged with capital crimes. By so doing, Attorney A fears he may be building a civil case against himself for malpractice if Defendant is convicted of first-degree murder or some lesser charge. Does Attorney A have a conflict of interest?

**Opinion #4:**

No. The fact that Attorney A's malpractice insurer has expressed concern regarding Attorney A's representation of Defendant does not create a disqualifying conflict of interest because Attorney A's responsibility to his client should not be limited or affected by his malpractice carrier's concern. See Rule 5.1(B). If Attorney A accepts the appointment of the court and proceeds with the representation, Attorney A has a duty to zealously represent his client to the best of his ability. See Canon VII. This includes taking whatever steps are necessary to make himself competent to handle the case including, but not limited to, attempting to associate an experienced lawyer or seeking the court appointment of an experienced lawyer to assist him, educating himself about the relevant law, utilizing available resources such as the resource center in the office of the appellate defender (which provides assistance to counsel for those accused of capital crimes), traveling to an adequate law library, etc. Attorney A may not pursue a course of conduct that will intentionally prejudice or damage Defendant during the course of the professional relationship. See Rule 7.1(A)(3). This would include approaching the representation from the perspective that his job is to document his own incompetence.

If Attorney A represents Defendant to the best of his ability, but concludes that he may have committed an error or errors that were prejudicial to Defendant's case, he must advise Defendant that mistakes were made that may have been harmful to Defendant's case and that it is in Defendant's best interest to consult independent counsel regarding his legal rights. See Rule 6(B)(2)(1) and (2).

*Note: Whether a lawyer can be required, over his objection, to represent a criminal defendant if he has not voluntarily placed his name on a list for court appointments is a legal issue which the Ethics Committee has no authority to address. Moreover, no opinion is expressed herein as to the constitutional propriety of appointing inexperienced lawyers to represent indigent criminal defendants in capital cases.*

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## RPC 200

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January 13, 1995

### Contacts with Clients after a Lawyer Leaves a Firm

*Opinion rules that the lawyers remaining with a firm may contact by phone or in person clients whose legal matters were handled exclusively by a lawyer who has left the firm.*

**Inquiry #1:**

ABC Law Firm has several offices across the state. For many years, Attorney D was the sole attorney present in ABC Law Firm's satellite office in Little City. While he worked for ABC Law Firm, the clients for whose matters Attorney D was responsible were almost exclusively residents of Little City. These clients were not referred to Attorney D by other members of ABC Law Firm nor did the other members of ABC Law Firm assist with the representation of these clients.

Attorney D recently resigned from ABC Law Firm in order to set up his own law practice. He would like to telephone or go to see the clients that he was representing at the time of his departure from ABC Law Firm in order to inform these clients that he is no longer with the firm and to advise each client of the client's options with regard to the continuation of the client's representation. May Attorney D contact these clients for this purpose?

**Opinion #1:**

Yes, Attorney D may personally contact, telephone or write to the clients for whose work he was responsible at the time of his departure from the firm. Together with the lawyers remaining with ABC Law Firm, Attorney D has an obligation to ensure that the representation of these clients continues despite his departure from the firm. RPC 48. Notice, either written or in-person, should be given to each such client informing the client of Attorney D's departure from the firm and advising the client of the right freely to choose counsel. Rule 6(B) of the Rules of Professional Conduct. Specifically, the client should be advised that he or she has the option of retaining Attorney D as his or her lawyer, requesting that another lawyer with ABC Law Firm take over the representation, or engaging a lawyer from another firm. The notice should also advise the client that he or she will need to instruct ABC Law Firm with regard to the disposition of the client's file if the client

chooses to move his or her representation to another law firm. Rule 2.8(A)(2).

The preferred method of advising clients of the departure of a lawyer or lawyers from a law firm is by the sending of a notice upon which the remaining and departing lawyers agree and which clearly informs the clients of their right freely to choose counsel. See RPC 48.

**Inquiry #2:**

May Attorney D call or personally visit clients for whose work he was responsible while he was a lawyer with ABC Law Firm but whose representation was complete at the time of his departure from the firm if the primary purpose of his contact with these former clients is to solicit employment?

**Opinion #2:**

Yes. Rule 2.4(A) only prohibits in-person or live telephone contact to solicit professional employment from a prospective client if the lawyer has no family or prior professional relationship with the prospective client. A "prior professional relationship" means "that the subject attorney actually was involved in a personal attorney-client relationship with the prospective client." RPC 98. Such communication should be in compliance with Rule 2.4(B) which prohibits solicitation by written, recorded or in-person communications even when not otherwise prohibited by Rule 2.4(A) if the client has made known to the lawyer a desire not to be solicited by the lawyer or the solicitation involves coercion, duress, harassment, etc.

**Inquiry #3:**

May the other lawyers in ABC Law Firm telephone or visit the clients whose legal matters were being handled by Attorney D at the time of his departure in order to advise the clients of Attorney D's departure and to discuss their representation?

**Opinion #3:**

Yes, the firm may designate a member of the firm who will be responsible for notifying the clients of the departure of Attorney D and advising them of the right freely to choose counsel as described in Opinion #1 above.

Such verbal or written contact with these clients is not improper solicitation of prospective clients in violation of Rule 2.4(A) or (C) because the clients are not prospective clients of the firm. With regard to such clients, the remaining lawyers with ABC Law Firm have an obligation to ensure that the representation of each client continues or is responsibly transferred to an outside lawyer chosen by the client. To the extent that RPC 48 or RPC 98 imply that a member of ABC Law Firm would be prohibited under these circumstances from contacting any of the clients whose matters were being handled by Attorney D at the time of his departure from the firm unless such a lawyer had a personal professional relationship with the client, RPC 48 and RPC 98 are overruled.

**Inquiry #4:**

If their purpose is to solicit professional employment, may the lawyers remaining with ABC Law Firm telephone or visit clients for whose work Attorney D was responsible prior to his departure from ABC Law Firm but whose representation had ended prior to the time that Attorney D left the firm?

**Opinion #4:**

Yes, provided such communication does not violate Rule 2.4(B). See opinion #3.

**Inquiry #5:**

May the lawyers remaining with ABC Law Firm use written, telephone or in-person communications to solicit professional employment from a client whose active file was being handled by Attorney D at the time of his departure if the client has notified the firm that he or she has obtained other legal counsel and no longer needs the services of the firm?

**Opinion #5:**

Yes, provided such communication does not violate Rule 2.4(B). See opinion #3.

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## RPC 201

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January 13, 1995

### Combining Law Practice and Work as Realtor

*Opinion explores the circumstances under which a lawyer who is also a real estate salesperson may close real estate transactions brokered by the real estate company with which he is affiliated.*

**Inquiry #1:**

Attorney A has an active real estate license and is a real estate salesman for Real Estate Company. Attorney A's office is located inside the offices of Real Estate Company. From his office, Attorney A operates his law practice and sells real estate. There is no signage on the office door for Real Estate Company or on the exterior of the building that indicates that Attorney A operates a separate law practice from within the offices of Real Estate Company. The same telephone number is used for Real Estate Company and Attorney A's law practice.

Attorney A does not separately advertise his services as a lawyer. He does advertise and hold himself out as a lawyer in Real Estate Company's television and print advertisements. Real Estate Company advertises itself as providing "full service" which includes real estate closing services. Most of Attorney A's legal business comes from referrals from Real Estate Company, and Real Estate Company recommends that its customers use Attorney A to close their real estate transactions.

May Attorney A receive a real estate sales commission on a real estate transaction for which he provided legal services to any party involved in the transaction other than Real Estate Company?

**Opinion #1:**

No. Rule 5.1(B) requires a lawyer to decline to represent a client if the representation of the client may be materially limited by the lawyer's own interest. If Attorney A would realize a valuable commission from the closing of a real estate transaction, it is likely that Attorney A's judgment on behalf of the buyer, seller, or lender will be materially limited. CPR 307 specifically holds that a lawyer may not certify title to property he has listed or sold. See also RPC 49.

**Inquiry #2:**

May Attorney A close real estate transactions brokered by Real Estate Company if he did not list or sell the property and he will not earn a commission from the transaction?

**Opinion #2:**

Yes, provided Attorney A reasonably concludes that the exercise of his independent, professional judgment on behalf of his clients will not be "materially impaired" by his desire to advance the interests of Real Estate Company or his desire to encourage future referrals. Rule 5.1(B). A lawyer is not prohibited by the Rules of Professional Conduct from utilizing the same office for both the practice of law and for conducting another business. See CPR 266. However, in analyzing his ability to exercise his independent, professional judgment on behalf of his clients, Attorney A must consider whether the location of his law practice within the confines of the offices of Real Estate Company will affect his professional judgment because of the close physical proximity of realtors who are referring legal business to him. If the location of his office will affect his professional judgment, Attorney A must either decline to represent the parties to real estate transactions brokered by Real Estate Company or he must relocate his law practice to separate offices. If Attorney A concludes that he can manage the potential conflict of interest, the clients must also consent to the potential conflict after full disclosure of Attorney A's affiliation with Real Estate Company. See Rule 5.1(B).

[Apart from the potential conflict of interest posed by this inquiry, the Ethics Committee has serious concerns about Attorney A's ability to fulfill his duty of confidentiality while he is practicing law within the confines of the offices of the real estate company with which he is affiliated.]

**Inquiry #3:**

May Attorney A waive his legal fee for services rendered in closing a real estate transaction in exchange for the real estate commission he earned as the agent responsible for the sale of the real property?

**Opinion #3:**

No. See opinion #1 above.

**Inquiry #4:**

May Attorney A receive a real estate commission in lieu of a legal fee for closing a real estate transaction if Attorney A shares the

commission with other realtors with Real Estate Company or other unrelated real estate companies?

**Opinion #4:**

No. See opinion #1 above.

**Inquiry #5:**

May Attorney A perform legal services in connection with real estate closings for clients referred to him by Real Estate Company if Attorney A did not list or sell the property involved in the transaction?

**Opinion #5:**

Yes. This is the same inquiry as inquiry #2 above. See opinion #2 above.

**Inquiry #6:**

Is Attorney A required to disclose to all clients referred by Real Estate Company that he is a real estate agent for Real Estate Company and paid commissions by Real Estate Company?

**Opinion #6:**

Yes. See opinion #2 above.

**Inquiry #7:**

May Attorney A provide legal services to customers of Real Estate Company if Attorney A fully discloses his relationship to Real Estate Company?

**Opinion #7:**

Yes, see opinion #2 above. Attorney A may only provide legal services to customers of Real Estate Company who are referred to him by Real Estate Company, but he may not share his legal fees with Real Estate Company nor may he pay Real Estate Company anything for recommending his services. See Rule 2.3(C), which prohibits a lawyer from giving anything of value to someone for recommending his services, and Rule 3.2, which prohibits the sharing of legal fees with nonlawyers. Moreover, if Attorney A is employed by Real Estate Company as in-house counsel and, as such, is providing legal services to the customers of Real Estate

Company, it would be a violation of NCGS. 84-5 which forbids corporations to engage in the practice of law.

**Inquiry #8:**

Is Real Estate Company engaged in the unauthorized practice of law under the foregoing facts?

**Opinion #8:**

The determination of whether a nonlawyer is engaged in the unauthorized practice of law is outside of the authority of the Ethics Committee.

**Inquiry #9:**

Is Attorney A assisting Real Estate Company in the unauthorized practice of law under the foregoing facts?

**Opinion #9:**

If Attorney A is employed by Real Estate Company as in-house counsel and, in this capacity, he is providing legal services to the customers of Real Estate Company, it would be a violation of NCGS 84-5, which prohibits a corporation from engaging in the practice of law. Such conduct would constitute aiding the unauthorized practice of law in violation of Rule 3.1(A).

**Inquiry #10:**

May a lawyer for a title insurance company issue a title insurance policy based upon Attorney A's certification of title if Attorney A is providing legal services to customers of Real Estate Company as an employee or in-house counsel for Real Estate Company?

**Opinion #10:**

If an attorney for a title insurance company knows that Attorney A is providing legal services to customers of Real Estate Company in violation of NCGS. 84-5, which prohibits a corporation from engaging in the practice of law, the attorney for the title insurance company may not aid in this practice. Rule 3.1(A).

**Inquiry #11:**

May Attorney A practice law from his office in Real Estate Company's office and use the same telephone number as Real Estate Company?

**Opinion #11:**

Yes, if the office receptionist and the office signage clearly indicate that Attorney A's legal practice is separate and distinct from the real estate business operated by Real Estate Company. Rule 2.1(A) and CPR 266.

**Inquiry #12:**

May Attorney A or Attorney A's name appear in Real Estate Company's television and print ads, including brochures identifying Attorney A as a lawyer as well as a real estate salesman?

**Opinion #12:**

Yes, if the advertisements do not include false or misleading communications about Lawyer A or Lawyer A's services in violation of Rule 2.1 and do not imply that legal services will be provided by a corporation in violation of NCGS. 84-5. See CPR 307.

**Inquiry #13:**

May Attorney A include business cards identifying him as a lawyer in sales promotion packets sent by Real Estate Company to customers whether the packets are solicited or unsolicited by the customers?

**Opinion #13:**

Yes, see opinion #12 above.

**Inquiry #14:**

May Attorney A be employed as in-house counsel for Real Estate Company and also close real estate transactions referred to him by Real Estate Company?

**Opinion #14:**

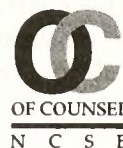
No. See opinion #7 above.

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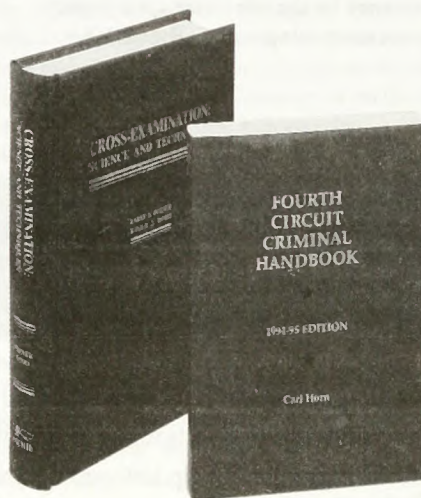
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# Trust Account Guidelines and IOLTA Questions and Answers

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# Everything You Always Wanted to Know About Trust Accounting, But Were Afraid to Ask

Editor's Note: Rule citations refer to provisions of the Rules of Professional Conduct.

## Trust Accounts - What Are They and How Many Do You Need?

(Questions 1-5)

### 1. What is a trust account?

A trust account is a bank account maintained incident to a lawyer's law practice and in which the lawyer holds funds received in a fiduciary capacity, including those held on behalf of or belonging to a client. Rule 10.1(b)(2).

### 2. Who must have a trust account?

Any lawyer who receives funds in a fiduciary capacity in the context of his or her law practice must maintain a trust account. The lawyer must establish a trust account before receiving such funds. Rules 10.1(a) and (b).

### 3. Are there restrictions about the kinds of institutions where trust accounts can be maintained?

Yes. Trust accounts can only be maintained at federally or North Carolina chartered banks, savings and loan associations, or credit unions. Unless the client specifically provides written direction to the contrary, the bank at which a trust account is maintained must be in North Carolina. Rule 10.1(b)(1).

### 4. How many trust accounts does a lawyer need?

Generally speaking, a lawyer needs only one trust account to handle monies received in trust which are either nominal in amount or held for a short period of time. Within this common account, the funds of many clients may be commingled so long as adequate records are kept to identify to the funds of each client. Rules 10.1(b) and (c).

### 5. Does each lawyer in a firm need a separate trust account?

No. Each lawyer in a firm may ethically use a common account so long as adequate records are maintained. However, multiple accounts are permissible. A lawyer may personally maintain several trust accounts if he or she desires. Rule 10.1(b).

## May a Trust Account Bear Interest?

(Questions 6-8)

### 6. What sort of bank account must be maintained?

Since a lawyer has an ethical obligation to pay or deliver client funds promptly as instructed by the client, trust accounts are generally demand accounts with check writing privileges. Because trust funds are typically nominal in amount or held for only a short period of time, there is no general requirement that the trust account be interest bearing. Rule 10.2(e).

### 7. Does a lawyer ever have an obligation to maintain an interest-bearing trust account?

Yes. If, because of the size of the deposit or the length of time the deposited funds are to be held, a prudent person acting in a fiduciary capacity would be compelled to invest the funds, a lawyer receiving money under such circumstances would have a corresponding obligation to de-

posit the funds in an interest-bearing account. In such a situation, the trust account in which such funds are deposited should be separate from the lawyer's general trust account. Any interest generated would be the property of the client. Rule 10.1(d).

### 8. Is it ever appropriate for a lawyer to use an interest-bearing trust account as his or her general trust account?

Yes. Lawyers wishing to participate in the State Bar's IOLTA program, which is explained in more detail elsewhere in the *Lawyer's Handbook*, may maintain trust funds in interest-bearing checking accounts. The interest earned on such accounts is remitted by the depository bank directly to the IOLTA Board of Trustees, which subsequently distributes the funds in the form of grants to persons or entities for various public purposes in accordance with the rules of the IOLTA program. Rules 10.1(d) and 10.3.

## How Do You Label a Trust Account?

(Question 9)

### 9. How should a trust account be identified?

A trust account must be clearly labeled and designated as a "trust account," and all checks drawn on the account must be so identified. For instance, an appropriate title for the account might be "The Trust Account of John Smith" or "Smith, Jones & Williams Trust Account." Rule 10.1(b). A properly labeled trust account check is appended as Exhibit A.

## What Goes in the Trust Account?

(Questions 10-13)

### 10. How does a lawyer know what funds should be deposited in the trust account?

The general rule is that every receipt of money from a client or for a client which will be used or delivered on the client's behalf should be placed in the trust account. This includes funds received by the attorney as an escrow agent. Rule 10.1(b)(4) and Comment.

### 11. What about funds received by the lawyer as a fiduciary outside the context of his or her law practice?

The trust account rules are not applicable in cases where the lawyer handles money for a business, religious, civic, or charitable organization as an officer, employee, or other official of that organization. The lawyer's only professional obligation regarding such funds is to deal honestly. Rule 10.1 Comment.

### 12. What about funds received by a lawyer acting as a court-appointed fiduciary or pursuant to appointment in some specific trust instrument?

The trust account rules are not generally applicable to lawyers serving as trustees, personal representatives, or attorneys in fact. However, lawyers serving in such fiduciary roles must segregate property held in trust from their personal property, maintain the minimum financial records required for trust accounts and instruct any financial institution in which property of a trust is held to notify the North Carolina State Bar of any

negotiable instruments drawn on the account which are presented for payment against insufficient funds. Rules 10.1(a), 10.2(b), (c), and (f).

### **13. Is it appropriate to deposit items other than cash or cash equivalents in the trust account?**

Generally speaking, any negotiable instrument may be deposited in a trust account whether or not it represents collected funds. Unless specifically permitted by law, the Rules of Professional Conduct or definitive interpretations thereof, no withdrawal should be made with respect to any deposited item until the funds represented by that item are collected. Rules 10.1(b)(5) and 10.2(e)(1).

## **What Does Not Go in the Trust Account?**

(Questions 14-15)

### **14. May a lawyer deposit his or her own funds in a trust account?**

No funds belonging to the lawyer may be deposited in the trust account except such funds as are necessary to open or maintain the account, pay service charges or intangibles tax, and funds belonging in part to a client and in part presently or potentially to the lawyer, such as where a deposited item represents both the client's recovery and the lawyer's fee. In such a case, the portion of the funds belonging to the lawyer must be withdrawn from the trust account as soon as the lawyer becomes entitled to the funds unless the right of the lawyer to receive that portion is disputed by the client, in which event the disputed portion must remain in the trust account until the dispute is resolved. Rule 10.1(c).

### **15. Should retainers be deposited in the trust account?**

Strictly speaking, no. A retainer in its truest sense is money paid to the lawyer to reserve the exclusive use of the lawyer's services for a particular time or in regard to a particular matter. Since a retainer is deemed earned when paid, it immediately becomes the property of the lawyer and as such must not be deposited in the trust account. True retainers must be distinguished from fees paid in advance which are intended to be held by the lawyer as security deposits against work which is yet to be performed. Since a lawyer has an ethical obligation to refund the unearned portion of any fee paid in advance upon discharge or withdrawal, such funds are not considered property of the lawyer and must be held in the trust account until they are earned. Rules 2.8(a)(3) and 10.1(a) and Comment.

## **What Records Are Required?**

(Questions 16-20)

### **16. What are the minimum record keeping requirements for a trust account?**

Any attorney maintaining a trust account must keep the following records:

1. A record of receipts. This can be a journal, file of receipts, file of deposit slips, or a collection of checkbook stubs. The record of receipts must list the source, client, and date of the receipt of all trust funds. Examples of properly composed deposit slips are appended as Exhibits B and C.
2. A record of disbursements. This can be a journal or a collection of canceled checks showing dates of disbursements, recipients, and client balances against which disbursements have been made.
3. A file or ledger for each person or entity from whom or for whom trust money has been received which states a current running balance of trust funds held for that person or entity. Examples of properly composed ledger cards are appended as Exhibits D and E.
4. All canceled checks drawn on the trust account and all official correspondence received from the bank concerning the account. Rule 10.2(c).

### **17. How does this work in practice?**

It can be very simple. All that is really required is a checkbook, a ledger card for each client, and a file for correspondence from the bank. When properly maintained, all the information required for deposits and disbursements can be recorded on the checkbook stub. The only other record which must be generated by the lawyer is a ledger card for each client describing each transaction involving the client's funds and carrying a running balance. Rule 10.2(c).

### **18. How long must these records be kept?**

The lawyer must retain trust account records for a period of six years following the completion of the transactions which generated the records. Rule 10.2(b).

### **19. Can trust account records be kept on computer?**

Yes, if the records are retrievable in hard copy or in digital form for the required six-year period. Rule 10.2(b).

### **20. How often must trust account records be reconciled?**

A lawyer must reconcile the trust account balances of funds belonging to all clients at least quarterly with the statements provided by the bank. At a minimum, this is intended to ensure that the running balances kept for each client equal the total funds on deposit, exclusive of funds belonging to the lawyer which have been properly deposited in the account. Rule 10.2(d). A lawyer maintaining a trust account must produce any or all of the required trust account records upon lawful demand by the North Carolina State Bar. Rule 10.2(g). Copies of proper trust account reconciliation forms are attached as Exhibits F and G.

## **What Disbursements Are Appropriate?**

(Questions 21-26)

### **21. Can a lawyer unilaterally decide to use funds held in trust to pay his or her legal fee or the claims of other creditors?**

As the client's agent and fiduciary, the lawyer has an obligation to pay or deliver the funds in accordance with the client's most recent instructions. Unless the lawyer is authorized by the client to pay a particular charge or claim, the lawyer may not disburse trust funds for those purposes. Rule 10.2(e).

### **22. What if the lawyer has an interest in funds received in settlement of a claim or in satisfaction of a judgment?**

All receipts of trust money must be deposited into the trust account intact. If an instrument represents funds belonging in part to the client and in part to the lawyer, the portion belonging to the lawyer must be withdrawn when the lawyer becomes entitled to the funds unless the right of the lawyer to receive the portion of the funds is disputed by the client. In that case the disputed portion must remain in the trust account until the dispute is resolved. Rules 10.2(c)(1) and 10.1(c)(2).

### **23. What happens if a client directs the attorney not to pay medical bills incident to the settlement of a tort claim?**

Generally, the lawyer must follow the client's most recent directions. Unless the health care provider in question has perfected a statutory lien against the funds in the hands of the lawyer, the lawyer must handle the settlement proceeds as directed by the client. CPR 358.

### **24. Is it ever proper for a lawyer to make disbursements from the trust account with respect to funds represented by a deposited instrument which has not yet been collected?**

In residential real estate closings it has long been recognized that lawyers may ethically issue trust account checks against funds which, although uncollected, are provisionally credited to the lawyer's trust account by the financial institution in which the trust account is maintained. CPR 358. Such disbursements against provisionally credited funds should only be made where the lawyer reasonably believes that the underlying deposited instrument is virtually certain to be honored when

presented for collection. The Ethics Committee has recently proposed an opinion which provides an exclusive listing of instruments with respect to which provisionally credited funds may be ethically disbursed. Revised Proposed RPC 191.

Editor's Note: Revised Proposed RPC 191 is scheduled for final consideration by the Ethics Committee and the council in mid-April 1995.

### **25. What should a lawyer do if he or she properly disburses against a provisionally credited instrument which is ultimately dishonored?**

Revised proposed RPC 191 provides that the lawyer, upon learning that one of the listed items has been dishonored, must act immediately to protect the property of the lawyer's other clients by personally paying the amount of the failed deposit or by securing or arranging for payment from sources available to the lawyer other than the trust funds of other clients. An attorney should take care not to disburse against uncollected funds in situations where the attorney's assets or credit would be insufficient to fund the trust account checks in the event that a provisionally credited item is dishonored. Revised Proposed RPC 191.

### **26. Can lawyers disburse against provisionally credited items in cases other than real estate closings?**

Yes. Revised Proposed RPC 191 specifically provides that it applies to transactions other than real estate conveyances.

## **What If a Trust Account Check Bounces?**

(Questions 27-28)

### **27. What should a lawyer do if his or her trust account check bounces?**

Theoretically, of course, this should never happen. As a practical matter, however, mistakes do happen and bank errors or administrative snafus within the lawyer's own office can result in an instrument's being returned for insufficient funds. If a trust account check is dishonored, the lawyer should immediately ascertain the nature of the problem and promptly correct it, even if this requires a deposit of the lawyer's own funds. Under no circumstances should the lawyer allow the trust funds of another client to be used impermissibly. Finally, the lawyer should document the problem and the corrective action taken immediately in a memorandum for his or her own files. Rule 10.2(e).

### **28. Must a report be made to the State Bar?**

Every lawyer must instruct his or her bank to notify the State Bar when any check drawn on the trust account is presented for payment against insufficient funds. That being the case, a lawyer who overdraws his or her trust account may soon expect to be contacted by a representative of the State Bar who will informally request an explanation of the problem. Once it is verified that an innocent mistake caused the shortage or apparent shortage in the trust account, the inquiry will be concluded and no further action will be taken. If, however, no adequate explanation is immediately forthcoming, a grievance file will be established and a formal investigation initiated. Rule 10.2(f).

## **How Should Accountings Be Handled?**

(Questions 29-30)

### **29. How often should a lawyer provide an accounting to a client for the client's trust funds?**

An accounting must be provided to the client upon the completion of the disbursement of the client's funds and at such other times as may be reasonably requested by the client. If trust funds are retained for more than one year, the lawyer must provide annual accountings. All accountings must be in writing. Rule 10.2(d).

### **30. Do accountings have to be in a particular form?**

No. It is often possible to satisfy the accounting requirement by providing copies of documents generated during the representation, such as a settlement statement describing disbursements incident to the resolution of a tort claim or a HUD-1 statement describing the disbursement of the proceeds of sale in a real property transaction. In addition, the accounting requirement can generally be satisfied by providing the client with a copy of a properly maintained ledger card which describes all receipts and disbursements of the client's funds. A sample accounting form is attached as Exhibit H. A sample cover letter is attached as Exhibit I.

## **What Should Be Done With Unclaimed Trust Funds**

(Question 31)

### **31. Suppose a lawyer holds funds in his or her trust account and does not know either the identity or the location or both of the owner of those funds. What should be done with the money?**

Under such circumstances, the lawyer must first make a diligent attempt to determine the identity and location of the owner of the funds in order that an appropriate disbursement might be made. If the lawyer is unsuccessful in ascertaining the identity and location of the owner of the funds, the lawyer should consider whether the funds must be escheated to the state of North Carolina. Pending escheat, such funds should continue to be held and accounted for in the lawyer's trust account. Rule 10.2(h).

## **Is There Help Available?**

(Question 32)

### **32. Does the State Bar offer assistance concerning trust account maintenance?**

Yes. Just call the State Bar office at (919)828-4620. If you need ethics advice ask for Alice Neece Moseley who is assistant executive director and counsel to the Ethics Committee. If you need technical support, ask for Bruno DeMolli, staff auditor.

Exhibit A

DeMQLLI & WARREN P.A.  
TRUST ACCOUNT  
RALEIGH, NC 27606

122  
66-25  
531

July 4 19 88

PAY TO THE ORDER OF XYZ Mortgage Company \$ 73,091.00

Seventy-three thousand ninety-one & 00/100 DOLLARS

**NCNB** NCNB National Bank of North Carolina Raleigh, NC 27601

FOR (Client's Name)

⑆053100258⑆ 0122

The client's name or ID number whose funds are being disbursed should appear on the check. Various style checks are printed with a "For" line and others have a block in the upper center of the check. Some have a small block on the payee and amount lines. The computer printed check form produces a copy that should indicate the client's name, therefore not requiring the client's name appear on the check itself.

The purpose for the disbursement may be indicated after the client's name (i.e. sale of 1001 Ranch Ave., termite inspection, filing fee, etc.).

Exhibit B

Deposits for Same Client

This deposit concerns a real estate closing.

The source of the \$100.00 & \$250.00 which are personal funds of client A need not be further identified, although you may want to indicate money order, certified check, etc. It would also be acceptable in this example to write Client A's name across the deposit slip once and only identify the source of the \$1,500 & \$10,800 deposits (i.e. NCNB & Wachovia) since all deposits pertain to Client A.

PLEASE ENDORSE ALL CHECKS

DATE 6-3 19 88

CHECKS AND OTHER ITEMS ARE RECEIVED FOR DEPOSIT SUBJECT TO THE RULES AND REGULATIONS OF THIS INSTITUTION. DEPOSITS MAY NOT BE AVAILABLE FOR IMMEDIATE WITHDRAWAL.

PLEASE LIST EACH CHECK SEPARATELY

	DOLLARS	CENTS
Client A CURRENCY	100	00
COINS		
CHECKS		
1 NCNB		
2 Client A	1,500	00
3		
4 Wachovia		
5 Client A	10,800	00
6		
7		
8 Client A	250	00
9		
10		
11		
12		
13		
14		
15		
16		
17		
FRONT SIDE TOTAL		
REVERSE SIDE TOTAL		
TOTAL DEPOSIT	12,650	00

USE REVERSE SIDE FOR ADDITIONAL LISTING OR ATTACH TAPE

Exhibit C

Multiple Deposits for Various Clients

The \$50 and \$100 deposits were personal funds of Clients B and D, respectively. The \$15,000 was received on behalf of Client C's personal injury settlement. Sixty Thousand Dollars (\$60,000) was deposited for Client E's real estate closing.

PLEASE ENDORSE ALL CHECKS

DATE 6-3 19 88

CHECKS AND OTHER ITEMS ARE RECEIVED FOR DEPOSIT SUBJECT TO THE RULES AND REGULATIONS OF THIS INSTITUTION.

PLEASE LIST EACH CHECK SEPARATELY

	DOLLARS	CENTS
CURRENCY Client B	50	00
COINS		
1		
2 Travelers Ins.	15,000	00
3 Client C		
4		
5 Client D	100	00
6		
7 Wachovia	60,000	00
8 Client E		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
FRONT SIDE TOTAL		
REVERSE SIDE TOTAL		
TOTAL DEPOSIT	75,150	00

USE REVERSE SIDE FOR ADDITIONAL LISTING OR ATTACH TAPE

## Exhibit D

### Ledger Card

Source of deposit or purpose of disbursement		Trust funds received	Trust funds disbursed	Paid by attorney on behalf of client	Check #	Attorney fees	Running balance							
(Client Name)					CASE OR FILE NO.									
DATE	NAME	MEMO	TRUST FUNDS RECEIVED	TRUST FUNDS DISBURSED	RECOVERED	ADVANCED	DATE PAID	CH. REC. BY	FILE NO.	RECEIVED	CHANGED	TR. BALANCE	TRUST ADVANCE	COST ADVANCE
3/3	Court Cost					30.00	1					100.00	100.00	30.00
3/9	Joe Who-deposit		500.00				2						500.00	
3/12	Will Do Good (Attorney fees/cost)			130.00			3	101				-0-	370.00	-0-
							4							
							5							
							6							
							7							
							8							
							9							
							10							
							11							
							12							
							13							
							14							
							15							
							16							
							17							
							18							
							19							
							20							
							21							
							22							
							23							

CLIENTS LEDGER

## Exhibit E

### Ledger Card

Source of Deposit or purpose of Disbursement		Check #	Amount Disbursed	Amount Deposited	Running Balance
NAME	YOUR CLIENT	ACCOUNT NO.			
ADDRESS	SHEET NO.				
DATE	ITEMS	Folio	DEBITS	CREDITS	BALANCE
Jan 3	All State Insurance Co.			21712 00	21712 00
6	What's Up Construction	101	13252 00		
6	Hi Motors	102	1200 00		
6	What's His Name MD	103	420 00		
6	Your Client	104	1202 69		
6	Memorial Hospital	105	4383 26		
6	Who's Furniture Co.	106	1254 05		— 0 —

Some attorneys provide a copy of the ledger card to the clients as a written accounting of the receipt and disbursement of the client's funds.

If the client comes to the office, he or she is requested to sign or initial and date the original card, and a copy is provided to the client. Otherwise, the copy is mailed with a cover memo or letter, of which a copy is retained for the file.

**Exhibit F**

<b>Trust Account Reconciliation</b>					
<b>Deposit Date</b>	<b>Client Name</b>	<b>Jan 95</b>	<b>Feb 95</b>	<b>March 95</b>	<b>April 95</b>
5/95	A		\$149.62	\$ .00	\$ .00
9/95	B		\$100.00	\$100.00	\$50.00
10/95	C	\$160.60	\$160.60	\$42.60	\$42.60
12/95	D	\$31.00	\$ .00	\$ .00	\$ .00
2/95	E		\$1200.00	\$1200.00	\$1200.00
2/95	F		\$400.00	\$291.00	\$100.00
2/95	G		\$21.00	\$16.00	\$ .00
3/95	H			\$74.50	\$75.00
3/95	I			\$954.00	\$500.00
4/95	J				\$40.00
<b>Trust Account Totals:</b>			<b>\$441.22</b>	<b>\$1860.00</b>	<b>\$2678.10</b>
<b>Bank Balance Total:</b>		<b>\$441.22</b>	<b>\$1840.00</b>	<b>\$2678.10</b>	<b>\$2007.10</b>

Work sheets and adding machine tapes pertaining to the balancing of the bank statement and reconciliation of the trust account should be retained.

Note: This example of a reconciliation of the trust account indicates the January totals agree, but that the February totals do not coincide. Because the trust account total is greater, the attorney/firm should immediately reimburse the trust account \$20.00 and attempt to determine the source of the discrepancy. The deposit slip recording the \$20.00 deposit to cover the discrepancy should indicate the source and purpose of the deposit (i.e. attorney/firm funds to cover reconciliation error in trust account). If the bank balance is greater, the discrepancy should be identified.

The dates indicated on this reconciliation represent the date of deposit or when the last accounting was provided to the client. This date can be used as a tickler system by the bookkeeper to meet the annual written notification requirement to the client if funds are held more than 12 months. Some attorneys select one day in the year and send an accounting to any client having a balance in the trust account. The State Bar requires trust account balances of funds belonging to all clients be reconciled at least quarterly.

**Exhibit G**

<b>Trust Account Reconciliation (4/95)</b>		
<b>Date of Deposit</b>	<b>Client Name</b>	<b>Balance</b>
1/95	A	\$50.00
4/95	B	\$75.00
5/95	C	\$1000.00
9/95	D	\$5000.00
1/95	E	\$27.40
4/95	F	\$10.10
		\$6162.50
<b>Bank Balance:</b>		<b>\$6162.50</b>

This reconciliation indicates a written annual accounting should have been provided to Clients A and B and an accounting is due to Client C. The date next to the client's name represents when the funds were deposited into the trust account or when the last written accounting was provided to the client. This date acts as a control to the bookkeeper in meeting 12-month written requirements. If periodic billing statements are provided to the client indicating the balance in the trust account, the 12-month period would commence at the date of the last billing.

## Exhibit H

**Attorney/Firms Name**

**Address**

**Accounting for Funds in Trust**

1/10/95

Client: Joe Whomever

**Receipts:**

Date	Source	Amount
1-3-95	All State Ins.	\$21,712.00
<b>Total Receipts:</b>		<b>\$21,712.00</b>

**Disbursements:**

Date	Recipient	Purpose	Amount
1-6-95	What's Up Construction	Roof Repair	\$13,252.00
1-6-95	Hi Motors	Car Repair	\$1,200.00
1-6-95	What's his name, MD	Medical Expenses	\$420.00
1-6-95	Joe Whomever	Payment	\$1,202.69
1-6-95	Who's Furniture Co.	Furniture payment	\$1,254.05
<b>Total Disbursements:</b>			<b>\$21,712.00</b>
<b>Balance:</b>			<b>\$ .00</b>

This accounting of the disbursement of your funds in the trust account is being provided as required by the rules of the North Carolina State Bar.

(Attorney)

## Exhibit I

**Lawyer/Firm Letterhead**

Mr./Mrs./Ms.

Address

City, State Zip

**Re: Periodic Accounting of Funds Held in Trust Account**

Dear \_\_\_\_\_:

I am writing to advise you that this office holds in trust the sum of \_\_\_\_\_ on your behalf. This information is being furnished to you as required by the Rules of the North Carolina State Bar.

This is a periodic accounting and no action is required on your part. However, if this report is incorrect, please contact this office immediately.

An accounting of your trust account record is available at any time.

Very truly yours,

\_\_\_\_\_

# Questions and Answers About IOLTA

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## **Q. How does the IOLTA program affect my current trust fund practices?**

A. IOLTA imposes no new burden upon lawyers. Once established by providing the trust account information to IOLTA, the account is handled no differently than current trust accounts. The financial institutions calculate and remit the interest, less service charges, directly to IOLTA. While financial institutions report IOLTA related transactions differently on their statements, the routine practice of balancing the account statement will always verify there is no net gain or net loss to the account. *Additionally, the decisions involved are no different. Lawyers have always exercised their discretion in determining whether a trust deposit was of sufficient size or duration to justify placement in a separate interest bearing account, with the interest payable to the client. Under the North Carolina program, lawyers retain their discretion in this area and continue to make such decisions after considering costs, tax ramifications, practicability and other factors.*

---

## **Q. How are service charges on IOLTA accounts handled?**

A. The IOLTA program pays normal service charges on IOLTA accounts and has instructed the financial institutions to deduct the service charges from the total due IOLTA from all trust accounts at that financial institution or to bill IOLTA if the service charges are greater than the interest earned in any remittance period. The IOLTA program does not pay for service charges due to NSF notices, stop payment charges, or check printing charges. If the financial institution requires the law firm to get a new trust account number or the law firm has to change financial institutions in order to participate in IOLTA, the IOLTA program will pay a one time check printing charge since the law firm would not incur this expense but for IOLTA participation. All financial institutions are instructed that no charges or fees can be deducted from the corpus of the lawyer's IOLTA account.

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## **Q. Do I have to explain IOLTA to my clients?**

A. No. The North Carolina Supreme Court approved the posting of the client notice in the lawyer's office to comply with the notice requirement. IOLTA provides the client notice on parchment paper to be posted in a place of the lawyer's choosing in the law office. This notice is automatically mailed to attorneys when they sign up to participate in IOLTA. Additional notices are provided upon request at no charge.

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## **Q. What are the tax consequences of participation in IOLTA?**

A. There are no tax consequences to the client or to the lawyer. The IRS stated in Revenue Ruling 81-209 that the interest earned on nominal and short-term client funds which is paid over to a court-established IOLTA program is not includable in the gross income of the client or the lawyer. North Carolina has a private letter ruling stating the same. Each IOLTA account will bear the tax identification number of the IOLTA Board of Trustees to ensure that interest on IOLTA accounts is reported to the IRS as income of the IOLTA program.

---

## **Q. Does my participation in IOLTA deprive my clients of any funds to which they are entitled?**

A. No, the client is not deprived of any interest income. Trust monies of the type to which IOLTA applies (nominal in amount or expected to be held for a short period of time) have traditionally been deposited in lawyers' common trust accounts that do not earn interest. Now that we have IOLTA, it is possible for such accounts to earn interest and for that interest to be used for law-related purposes for the public benefit. Cooperating financial institutions determine and pay interest on average balances in such accounts and remit to IOLTA. The financial institutions neither determine nor remit interest on a client by client basis.

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## **Q. Will my IOLTA decision carry any consequences in regards to the State Bar Random Audit of Trust Accounts or any other aspect of the State Bar's grievance and disciplinary activities.**

A. ABSOLUTELY NOT! Your IOLTA decision is in no way related to any other State Bar program. IOLTA is administered and staffed independently from the random audit program and grievance and disciplinary activities of the State Bar.

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## **Q. What if my financial institution does not participate in IOLTA?**

A. Complete the IOLTA form indicating your desire to participate in IOLTA. The IOLTA staff will contact your financial institution to explain the program and determine if they will participate. If the financial institution decides not to participate in IOLTA, you will be advised and you can decide whether to opt out of IOLTA or move your trust account to a participating financial institution.

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## **Q. How do I sign up for IOLTA?**

A. Complete and sign the IOLTA decision Form and return it to the State Bar IOLTA Program. The IOLTA staff will get the information from you and make the necessary arrangements with your financial institution to have your account established as an IOLTA account.

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## **Q. How are IOLTA funds used?**

A. The North Carolina plan for IOLTA allows the funds to be used for expenses of the administration of the program. The remainder of the funds are used to fund grants under six categories approved by the North Carolina Supreme Court as follows: 1) providing civil legal aid to poor people; 2) development of a fund to reimburse clients of lawyers who have misappropriated client's funds (the Client Security Fund is the proper grant applicant); 3) enhancement and improvement of grievance and disciplinary procedures for lawyers; 4) establishment and maintenance of lawyer referral systems; 5) development and maintenance of a fund for student loans for legal education on the basis of need; and 6) such other programs designed to improve the administration of justice as may be proposed by the IOLTA Board of Trustees and approved by the North Carolina Supreme Court.

The IOLTA program has awarded grants through 1995 totaling more than \$15 million. For more information about IOLTA, please call the staff at 919/828-0477.

## IOLTA Decision

Name of Law Firm/Sole Practitioner:

\_\_\_\_\_ I/We wish to participate in the IOLTA Program and authorize that the trust account(s) listed below be established as IOLTA account(s):

a. Trust account name and number:

b. Name and branch of financial institution:

a. Trust account name and number:

b. Name and branch of financial institution:

\_\_\_\_\_ I/We are ineligible to participate in IOLTA:

a. \_\_\_\_\_ I/We do not maintain a client trust account.

b. \_\_\_\_\_ I/We are not in private practice and do not handle client trust funds.

\_\_\_\_\_ I/We do not wish to participate in the North Carolina State Bar IOLTA Program.

(No explanation required)

\_\_\_\_\_  
Please type or print name of person signing

\_\_\_\_\_  
State Bar Number

\_\_\_\_\_  
Authorized Signature

\_\_\_\_\_  
Date

Note: Please list names of all practicing attorneys in firm. A sheet of your letterhead with all attorneys listed will serve this purpose.

Send to:

The North Carolina State Bar IOLTA Program

208 Fayetteville Street/P.O. Box 2687

Raleigh, NC 27602-2687

(919) 828-0477

FAX (919) 828-1718

# Directory of Legal Specialists

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# The North Carolina State Bar Board of Legal Specialization Directory of Board Certified Legal Specialists

**Bankruptcy Law, Criminal Law, Estate Planning And Probate Law,  
Real Property Law, and Family Law**

**January 1, 1995**

## **Business Bankruptcy Law**

### **ANGIER**

**Richard D. Sparkman**  
P.O. Drawer C  
Angier, NC 27501  
(919) 639-6181  
Admitted to NCSB: 1975  
Certified: 1987

### **ASHEVILLE**

**Sara H. Davis**  
Westall, Gray & Connolly  
81 Central Ave.  
Asheville, NC 28801  
(704) 254-6315  
Admitted to NCSB: 1980  
Certified: 1987

**David G. Gray, Jr.**  
Westall, Gray & Connolly  
81 Central Ave.  
Asheville, NC 28801  
(704) 254-6315  
Admitted to NCSB: 1972  
Certified: 1987

**Edward C. Hay, Jr.**  
Whalen, Hay, Pitts,  
Hugenschmidt, Master,  
Deveroux & Belser, P.A.  
P.O. Box 2868  
Asheville, NC 28802  
(704) 255-8085  
(704) 251-2760 (Fax)  
Admitted to NCSB: 1976  
Certified: 1987

**David R. Hillier**  
Gum & Hillier  
47 North Market St.  
Asheville, NC 28801  
(704) 258-3368  
Admitted to NCSB: 1974  
Certified: 1992

**Robert M. Pitts**  
Whalen, Hay, Pitts,  
Hugenschmidt, Master,  
Deveroux & Belser, P.A.  
P.O. Box 2868  
Asheville, NC 28802-2868  
(704) 255-8085  
(704) 251-2760  
Admitted to NCSB: 1973  
Certified: 1987

**Albert L. Sneed, Jr.**  
Van Winkle, Buck, Wall,  
Starnes & Davis  
P.O. Box 7376  
Asheville, NC 28802  
(704) 258-2991  
Admitted to NCSB: 1973  
Certified: 1987

### **CHAPEL HILL**

**John A. Northen**  
Northen, Blue, Rooks,  
Thibaut, Anderson &  
Woods  
P.O. Box 2208  
Chapel Hill, NC  
27515-2208  
(919) 968-4441  
Admitted to NCSB: 1975  
Certified: 1991

### **CHARLOTTE**

**David R. Badger**  
1560 Carillon  
227 W. Trade St.  
Charlotte, NC 28202  
(704) 375-8875  
(704) 375-8835 (Fax)  
Admitted to NCSB: 1972  
Certified: 1987

**J. Michael Booe**  
Petree, Stockton, L.L.P.  
3500 One First Union Ctr.  
301 S. College Street  
Charlotte, NC 28202-6001  
(704) 338-5000  
(704) 338-5125 (Fax)

Admitted to NCSB: 1971  
Certified: 1987

**Albert F. Durham**  
Rayburn, Moon & Smith  
Suite 1200  
227 West Trade Street  
Charlotte, NC 28282  
(704) 334-0891  
(704) 377-0395 (Fax)  
Admitted to NCSB: 1975  
Certified: 1987

**Joseph W. Grier, III**  
Grier & Grier  
1240 One Independence  
Ctr.  
Charlotte, NC 28246  
(704) 375-3720  
Admitted to NCSB: 1977  
Certified: 1987

**James H. Henderson**  
Suite 150  
229 North Church Street  
Charlotte, NC 28202  
(704) 333-3444  
(704) 333-5003 (Fax)  
Admitted to NCSB: 1986  
Certified: 1993

**Rebecca S. Henderson**  
Petree, Stockton, L.L.P.  
3500 One First Union  
Center  
301 S. College Street  
Charlotte, NC 28282-6001  
(704) 338-5000  
(704) 338-5125 (Fax)  
Admitted to NCSB: 1986  
Certified: 1991

**George M. Hunter**  
Shuford, Hunter & Brown,  
P.A.  
301 S. McDowell Street  
Suite 707  
Charlotte, NC 28204  
(704) 377-0280  
(704) 377-8666 (Fax)  
Admitted to NCSB: 1986  
Certified: 1994

**Robert K. Johnson**  
Suite 600  
312 W. Trade St.  
Charlotte, NC 28202  
(704) 372-3867  
Admitted to NCSB: 1979  
Certified: 1987

**Robert L. Lindsey, Jr.**  
Lindsey & Schrimsher  
2316 Randolph Rd.  
Charlotte, NC 28207  
(704) 333-2141  
Admitted to NCSB: 1960  
Certified: 1992

**Richard M. Mitchell**  
Mitchell & Rallings  
1800 Carillon  
227 W. Trade St.  
Charlotte, NC 28202  
(704) 376-6574  
Admitted to NCSB: 1972  
Certified: 1987

**A. Burton Shuford**  
Shuford & Hunter  
301 S. McDowell St.  
Suite 707  
Charlotte, NC 28204  
(704) 377-0280  
Admitted to NCSB: 1981  
Certified: 1993

**James C. Whitley**  
401 West Trade Street  
Charlotte, NC 28282  
(704) 344-6169  
(704) 344-6314 (Fax)  
Admitted to NCSB: 1984  
Certified: 1990

### **DURHAM**

**Richard M. Hutson, II**  
Hutson, Hughes & Powell  
P.O. Drawer 2252-A  
Durham, NC 27702  
(919) 683-1561  
Admitted to NCSB: 1964  
Certified: 1987

**Robyn R. Compton  
Whitman**  
Hutson, Hughes & Powell,  
P.A.  
P.O. Drawer 2252-A  
Durham, NC 27702  
(919) 683-1561  
(919) 683-1276 (Fax)  
Admitted to NCSB: 1989  
Certified: 1994

### **FAYETTEVILLE**

**Alfred E. Cleveland, III**  
McCoy, Weaver, Wiggins,  
Cleveland & Raper  
P.O. Box 2129  
Fayetteville, NC  
28302-2129  
(910) 483-8104  
(910) 483-0094 (Fax)  
Admitted to NCSB: 1959  
Certified: 1987

### **GASTONIA**

**Langdon M. Cooper**  
Alala, Mulle, Holland &  
Cooper  
P.O. Box 488  
Gastonia, NC 28053  
(704) 864-6751  
Admitted to NCSB: 1969  
Certified: 1992

**P. Wayne Sigmon**  
Layton, Drum, Kersh,  
Solomon, Sigmon & Furr  
P.O. Box 2636  
Gastonia, NC 28053  
(704) 865-4400  
Admitted to NCSB: 1976  
Certified: 1987

### **GREENSBORO**

**Rayford K. Adams, III**  
Adams, Wall & Costley  
P.O. Box 21007  
Greensboro, NC 27420  
(910) 279-1007

(910) 379-8845 (Fax)  
Admitted to NCSB: 1979  
Certified: 1987

**Phillip E. Bolton**  
600 Green Valley Rd.  
Suite 305  
Greensboro, NC 27408  
(910) 294-7777  
Admitted to NCSB: 1985  
Certified: 1992

**Anita Jo Kinlaw-Troxler**  
Box 1720  
Greensboro, NC  
27402-1720  
(910) 378-9164  
Admitted to NCSB: 1975  
Certified: 1987

**Christine L. Myatt**  
Adams, Kleemeier, Hagan,  
Hannah & Fouts  
P.O. Box 3463  
Greensboro, NC 27402  
(910) 373-1600  
Admitted to NCSB: 1982  
Certified: 1990

**John H. Small**  
Brooks, Pierce,  
McLendon, Humphrey &  
Leonard  
P.O. Box 26000  
Greensboro, NC 27420  
(910) 373-8850  
Admitted to NCSB: 1979  
Certified: 1988

## HICKORY

**James S. Gorham, III**  
Gaither, Gorham & Crone  
P.O. Box 2507  
Hickory, NC 28603  
(704) 322-5505  
(704) 328-1882 (Fax)  
Admitted to NCSB: 1971  
Certified: 1994

## JACKSONVILLE

**Roger A. Moore**  
P.O. Box 886  
Jacksonville, NC 28541  
(910) 455-0448  
Admitted to NCSB: 1973  
Certified: 1987

## LUMBERTON

**Bruce F. Jobe**  
P.O. Box 2458  
Lumberton, NC 28359  
(910) 739-1010  
Admitted to NCSB: 1980  
Certified: 1987

## NEW BERN

**Ernest C. Richardson, III**  
P.O. Box 1594

New Bern, NC 28563  
(919) 633-2470  
Admitted to NCSB: 1972  
Certified: 1987

**Trawick H. Stubbs, Jr.**  
Stubbs, Perdue, Chesnutt,  
Wheeler & Clemmons  
P.O. Drawer 1654  
New Bern, NC 28563  
(919) 633-2700  
Admitted to NCSB: 1967  
Certified: 1987

## RALEIGH

**James B. Angell**  
Wyche & Story, L.L.P.  
P.O. Box 1389  
Raleigh, NC 27602-1389  
(919) 821-7700  
(919) 821-7703 (Fax)  
Admitted to NCSB: 1985  
Certified: 1993

**Gregory B. Crampton**  
Merriman, Nicholls &  
Crampton  
P.O. Box 18237  
Raleigh, NC 27619  
(919) 781-1311  
Admitted to NCSB: 1972  
Certified: 1987

**Donald A. Davis**  
P.O. Box 1007  
Raleigh, NC 27602  
(919) 834-9380  
Admitted to NCSB: 1970  
Certified: 1987

**Terri Gardner**  
Smith, Debnam, Hibbert &  
Pahl  
P.O. Drawer 26268  
Raleigh, NC 27611  
(919) 250-2000  
Admitted to NCSB: 1981  
Certified: 1987

**Holmes P. Harden**  
Maupin, Taylor, Ellis &  
Adams, P.A.  
P.O. Drawer 19764  
Raleigh, NC 27619  
(919) 981-4000  
(919) 981-4300 (Fax)  
Admitted to NCSB: 1981  
Certified: 1987

**Stephanl W. Humrickhouse**  
Merriman, Nicholls &  
Crampton  
P.O. Box 18237  
Raleigh, NC 27619  
(919) 781-1311  
Admitted to NCSB: 1980  
Certified: 1988

**Cindy G. Oliver**  
Womble, Carlyle,  
Sandridge & Rice  
P.O. Box 831  
Raleigh, NC 27602  
(919) 755-2166  
Admitted to NCSB: 1987  
Certified: 1993

**James L. Pahl**  
Smith, Debnam, Hibbert &  
Pahl  
P.O. Drawer 26268  
Raleigh, NC 27611  
(919) 250-2000  
Admitted to NCSB: 1972  
Certified: 1987

**Ashley H. Story**  
Wyche & Story, L.L.P.  
P.O. Drawer 1389  
Raleigh, NC 27602-1389  
(919) 821-7700  
(919) 821-7703 (Fax)  
Admitted to NCSB: 1982  
Certified: 1993

**Douglas Q. Wickham**  
P.O. Box 667  
Raleigh, NC 27602-0667  
(919) 821-8080  
Admitted to NCSB: 1987  
Certified: 1987

**N. Hunter Wyche, Jr.**  
Wyche & Story, L.L.P.  
P.O. Drawer 1389  
Raleigh, NC 27602  
(919) 821-7700  
(919) 821-7703 (Fax)  
Admitted to NCSB: 1980  
Certified: 1987

## ROCKY MOUNT

**David M. Warren**  
Poyner & Spruill  
P.O. Box 353  
Rocky Mount, NC 27802  
(919) 972-7112  
Admitted to NCSB: 1984  
Certified: 1992

**John S. Williford, Jr.**  
Fields & Cooper  
P.O. Drawer 4538  
Rocky Mount, NC  
27803-0538  
(919) 442-3115  
Admitted to NCSB: 1976  
Certified: 1987

## TARBORO

**Herbert F. Allen**  
P.O. Box 1258  
Tarboro, NC 27886  
(919) 641-1800  
Admitted to NCSB: 1975  
Certified: 1987

## WILSON

**Steven L. Beaman**  
Beaman & King  
P.O. Box 1907  
Wilson, NC 27894-1907  
(919) 237-9020  
Admitted to NCSB: 1974  
Certified: 1987

**Walter L. Hinson, Jr.**  
P.O. Box 7479  
Wilson, NC 27893  
(919) 291-1746  
Admitted to NCSB: 1973  
Certified: 1989

**Marjorie K. Lynch**  
P.O. Box 99  
Wilson, NC 27893  
(919) 291-1746  
Admitted to NCSB: 1986  
Certified: 1991

## WINSTON-SALEM

**Carl E. Allman, III**  
Allman, Spry, Humphreys,  
Leggett & Howington  
P.O. Drawer 5129  
Winston-Salem, NC  
27113-5129  
(910) 722-2300  
Admitted to NCSB: 1979  
Certified: 1990

**Catharine R. Carruthers**  
Allman, Spry, Humphreys,  
Leggett & Howington  
P.O. Box 5129  
Winston-Salem, NC  
27113-5129  
(910) 722-2300  
Admitted to NCSB: 1981  
Certified: 1988

**Robert E. Price, Jr.**  
Burns & Price  
NationsBank Bldg.  
Suite 450  
Winston-Salem, NC  
27101-3974  
(910) 722-8195  
Admitted to NCSB: 1980  
Certified: 1992

**Rory D. Whelehan**  
Womble, Carlyle,  
Sandridge & Rice  
P.O. Drawer 84  
Winston-Salem, NC  
27102  
(910) 721-3521  
(910) 721-3660  
Admitted to NCSB: 1989  
Certified: 1994

## Consumer Bankruptcy Law

### ANGIER

**Richard D. Sparkman**  
P.O. Drawer C  
Angier, NC 27501  
(919) 639-6181  
Admitted to NCSB: 1975  
Certified: 1987

### ASHEVILLE

**Sara H. Davis**  
Westall, Gray & Connolly  
81 Central Ave.  
Asheville, NC 28801  
(704) 254-6315  
Admitted to NCSB: 1980  
Certified: 1987

**David G. Gray, Jr.**  
Westall, Gray & Connolly  
81 Central Ave.  
Asheville, NC 28801  
(704) 254-6315  
Admitted to NCSB: 1972  
Certified: 1987

**Edward C. Hay, Jr.**  
Whalen, Hay, Pitts,  
Hugenschmidt, Master,  
Deveroux & Belser, P.A.  
P.O. Box 2868  
Asheville, NC 28802  
(704) 255-8085  
(704) 251-2760 (Fax)  
Admitted to NCSB: 1976  
Certified: 1987

**David R. Hillier**  
Gum & Hillier  
47 North Market St.  
Asheville, NC 28801  
(704) 258-3368  
Admitted to NCSB: 1974  
Certified: 1992

**T. Bentley Leonard**  
Leonard & Biggers, P.A.  
274 Merrimon Avenue  
Asheville, NC 28801  
(704) 255-0456  
(704) 252-6469 (Fax)  
Admitted to NCSB: 1973  
Certified: 1994

**Robert M. Pitts**  
Whalen, Hay, Pitts,  
Hugenschmidt, Master,  
Deveroux & Belser, P.A.  
P.O. Box 2868  
Asheville, NC 28802-2868  
(704) 255-8085  
(704) 251-2760 (Fax)  
Admitted to NCSB: 1973  
Certified: 1987

**Albert L. Sneed, Jr.**  
Van Winkle, Buck, Wall,  
Starnes & Davis

P.O. Box 7376  
Asheville, NC 28802  
(704) 258-2991  
Admitted to NCSB: 1973  
Certified: 1987

## CHAPEL HILL

**John A. Northen**  
Northen, Blue, Rooks,  
Thibaut, Anderson &  
Woods  
P.O. Box 2208  
Chapel Hill, NC  
27515-2208  
(919) 968-4441  
Admitted to NCSB: 1975  
Certified: 1991

## CHARLOTTE

**David R. Badger**  
1560 Carillon  
227 W. Trade St.  
Charlotte, NC 28202  
(704) 375-8875  
(704) 375-8835 (Fax)  
Admitted to NCSB: 1972  
Certified: 1987

**J. Michael Booe**  
Petree & Stockton  
3500 One First Union Ctr.  
Charlotte, NC 28202-6001  
(704) 372-9110  
Admitted to NCSB: 1971  
Certified: 1987

**Albert F. Durham**  
Rayburn, Moon & Smith  
Suite 1200  
227 West Trade Street  
Charlotte, NC 28282  
(704) 334-0891  
(704) 377-0395 (Fax)  
Admitted to NCSB: 1975  
Certified: 1987

**Joseph W. Grier, III**  
Grier & Grier  
1240 One Independence  
Ctr.  
Charlotte, NC 28246  
(704) 375-3720  
Admitted to NCSB: 1977  
Certified: 1987

**James H. Henderson**  
Suite 150  
229 North Church Street  
Charlotte, NC 28202  
(704) 333-3444  
(704) 333-5003 (Fax)  
Admitted to NCSB: 1986  
Certified: 1993

**Rebecca S. Henderson**  
Petree, Stockton, L.L.P.  
3500 One First Union  
Center  
301 S. College Street  
Charlotte, NC 28282-6001

(704) 338-5000  
(704) 338-5125 (Fax)  
Admitted to NCSB: 1986  
Certified: 1991

**George M. Hunter**  
Shuford, Hunter & Brown,  
P.A.  
301 S. McDowell Street  
Suite 707  
Charlotte, NC 28204  
(704) 377-0280  
(704) 377-8666 (Fax)  
Admitted to NCSB: 1986  
Certified: 1994

**Robert K. Johnson**  
Suite 600, Peace Bldg.  
312 W. Trade St.  
Charlotte, NC 28202  
(704) 372-3867  
Admitted to NCSB: 1979  
Certified: 1987

**Robert L. Lindsey, Jr.**  
Lindsey & Schrimsher  
2316 Randolph Rd.  
Charlotte, NC 28207  
(704) 333-2141  
Admitted to NCSB: 1960  
Certified: 1992

**Richard M. Mitchell**  
Mitchell & Rallings  
1800 Carillon  
227 W. Trade St.  
Charlotte, NC 28202  
(704) 376-6574  
Admitted to NCSB: 1972  
Certified: 1987

**A. Burton Shuford**  
Shuford & Hunter  
301 S. McDowell St.  
Suite 707  
Charlotte, NC 28204  
(704) 377-0280  
Admitted to NCSB: 1981  
Certified: 1993

**James C. Whitley**  
401 West Trade Street  
Charlotte, NC 28282  
(704) 344-6169  
(704) 344-6314 (Fax)  
Admitted to NCSB: 1984  
Certified: 1990

## DURHAM

**Richard M. Hutson, II**  
Hutson, Hughes & Powell  
P.O. Drawer 2252-A  
Durham, NC 27702  
(919) 683-1561  
Admitted to NCSB: 1964  
Certified: 1987

**Robyn R. Compton  
Whitman**  
Hutson, Hughes & Powell,  
P.A.

P.O. Drawer 2252-A  
Durham, NC 27702  
(919) 683-1561  
(919) 683-1276 (Fax)  
Admitted to NCSB: 1989  
Certified: 1994

## FAYETTEVILLE

**Alfred E. Cleveland, III**  
McCoy, Weaver, Wiggins,  
Cleveland & Raper  
P.O. Box 2129  
Fayetteville, NC  
28302-2129  
(910) 483-8104  
(910) 483-0094  
Admitted to NCSB: 1959  
Certified: 1987

## GASTONIA

**Langdon M. Cooper**  
Alala, Mulle, Holland &  
Cooper  
P.O. Box 488  
Gastonia, NC 28053  
(704) 864-6751  
Admitted to NCSB: 1969  
Certified: 1992

**P. Wayne Sigmon**  
Layton, Drum, Kersh,  
Solomon, Sigmon & Furr  
P.O. Box 2636  
Gastonia, NC 28053  
(704) 865-4400  
Admitted to NCSB: 1976  
Certified: 1987

## GREENSBORO

**Rayford K. Adams, III**  
Adams, Wall & Costley  
P.O. Box 21007  
Greensboro, NC 27420  
(910) 279-1007  
(910) 379-8845 (Fax)  
Admitted to NCSB: 1979  
Certified: 1987

**Phillip E. Bolton**  
600 Green Valley Rd.  
Suite 305  
Greensboro, NC 27408  
(910) 294-7777  
Admitted to NCSB: 1985  
Certified: 1992

**Anita Jo Kinlaw-Troxler**  
Box 1720  
Greensboro, NC  
27402-1720  
(910) 378-9164  
Admitted to NCSB: 1975  
Certified: 1987

**Christine L. Myatt**  
Adams, Kleemeier, Hagan,  
Hannah & Fouts  
P.O. Box 3463  
Greensboro, NC 27402

(910) 373-1600  
Admitted to NCSB: 1982  
Certified: 1990

**John H. Small**  
Brooks, Pierce,  
McLendon, Humphrey &  
Leonard  
P.O. Box 26000  
Greensboro, NC 27420  
(910) 373-8850  
Admitted to NCSB: 1979  
Certified: 1988

## HICKORY

**James S. Gorham, III**  
Gaither, Gorham & Crone  
P.O. Box 2507  
Hickory, NC 28603  
(704) 322-5505  
(704) 328-1882 (Fax)  
Admitted to NCSB: 1971  
Certified: 1994

## JACKSONVILLE

**Roger A. Moore**  
P.O. Drawer 886  
Jacksonville, NC 28541  
(919) 455-0448  
Admitted to NCSB: 1973  
Certified: 1987

## LUMBERTON

**Bruce F. Jobe**  
P.O. Box 2458  
Lumberton, NC 28359  
(910) 739-1010  
Admitted to NCSB: 1980  
Certified: 1987

## NEW BERN

**Kenneth R. Gillespie**  
Gillespie & Murphy, P.A.  
P.O. Drawer 888  
New Bern, NC 28563  
(919) 636-2225  
(919) 636-0625 (Fax)  
Admitted to NCSB: 1981  
Certified: 1994

**Ernest C. Richardson, III**  
P.O. Box 1594  
New Bern, NC 28563  
(919) 633-2470  
Admitted to NCSB: 1972  
Certified: 1987

**Trawick H. Stubbs, Jr.**  
Stubbs, Perdue, Chesnutt,  
Wheeler & Clemmons  
P.O. Drawer 1654  
New Bern, NC 28563  
(919) 633-2700  
Admitted to NCSB: 1967  
Certified: 1987

## RALEIGH

**William E. Brewer**  
P.O. Box 11672  
Raleigh, NC 27604  
(919) 832-2288  
Admitted to NCSB: 1976  
Certified: 1993

**Gregory B. Crampton**  
Merriman, Nicholls &  
Crampton  
P.O. Box 18237  
Raleigh, NC 27619  
(919) 781-1311  
Admitted to NCSB: 1972  
Certified: 1987

**Donald A. Davis**  
P.O. Box 1007  
Raleigh, NC 27602  
(919) 834-9380  
Admitted to NCSB: 1970  
Certified: 1987

**Terri Gardner**  
Smith, Debnam, Hibbert &  
Pahl  
P.O. Drawer 26268  
Raleigh, NC 27611  
(919) 250-2000  
Admitted to NCSB: 1981  
Certified: 1987

**Holmes P. Harden**  
Maupin, Taylor, Ellis &  
Adams, P.A.  
P.O. Drawer 19764  
Raleigh, NC 27619  
(919) 981-4000  
(919) 981-4300 (Fax)  
Admitted to NCSB: 1981  
Certified: 1987

**Stephani W.  
Humrickhouse**  
Merriman, Nicholls &  
Crampton  
P.O. Box 18237  
Raleigh, NC 27619  
(919) 781-1311  
Admitted to NCSB: 1980  
Certified: 1988

**Gerald A. Jeutter, Jr.**  
Petree, Stockton  
4101 Lake Boone Trail  
Suite 400  
Raleigh, NC 27607  
(919) 420-1700  
(919) 420-1800  
Admitted to NCSB: 1990  
Certified: 1994

**Cindy G. Oliver**  
Womble, Carlyle,  
Sandridge & Rice  
P.O. Box 831  
Raleigh, NC 27602  
(919) 755-2166  
Admitted to NCSB: 1987  
Certified: 1993

**James L. Pahl**  
Smith, Debnam, Hibbert &  
Pahl  
P.O. Drawer 26268  
Raleigh, NC 27611  
(919) 250-2000  
Admitted to NCSB: 1972  
Certified: 1987

**Douglas Q. Wickham**  
P.O. Box 667  
Raleigh, NC 27602-0667  
(919) 821-8080  
Admitted to NCSB: 1987  
Certified: 1987

**N. Hunter Wyche, Jr.**  
Wyche & Story, L.L.P.  
P.O. Drawer 1389  
Raleigh, NC 27602  
(919) 821-7700  
(919) 821-7703 (Fax)  
Admitted to NCSB: 1980  
Certified: 1987

## ROCKY MOUNT

**David M. Warren**  
Poyner & Spruill  
P.O. Box 353  
Rocky Mount, NC 27802  
(919) 972-7112  
Admitted to NCSB: 1984  
Certified: 1992

**John S. Williford, Jr.**  
Fields & Cooper  
P.O. Drawer 4538  
Rocky Mount, NC  
27803-0538  
(919) 442-3115  
Admitted to NCSB: 1976  
Certified: 1987

## SELMA

**Patricia B. Anthony**  
P.O. Box 758  
Selma, NC 27576  
(919) 965-4503  
Admitted to NCSB: 1987  
Certified: 1993

## TARBORO

**Herbert F. Allen**  
212 Main St.  
Tarboro, NC 27886  
(919) 823-1156  
Admitted to NCSB: 1975  
Certified: 1987

## WILSON

**Steven L. Beaman**  
Beaman & King  
P.O. Box 1907  
Wilson, NC 27894-1907  
(919) 237-9020  
Admitted to NCSB: 1974  
Certified: 1987

**Walter L. Hinson, Jr.**  
P.O. Box 7479  
Wilson, NC 27893  
(919) 291-1746  
Admitted to NCSB: 1973  
Certified: 1989

**Marjorie K. Lynch**  
P.O. Box 99  
Wilson, NC 27894  
(919) 327-6854  
Admitted to NCSB: 1986  
Certified: 1991

**Michael P. Peavey**  
P.O. Box 513  
Wilson, NC 27894-0513  
(919) 291-8020  
(919) 291-0652  
Admitted to NCSB: 1974  
Certified: 1994

## WINSTON-SALEM

**Carl E. Allman, III**  
Allman, Spry, Humphreys,  
Leggett & Howington  
P.O. Drawer 5129  
Winston-Salem, NC  
27113-5129  
(919) 722-2300  
Admitted to NCSB: 1979  
Certified: 1990

**Catharine R. Carruthers**  
Allman, Spry, Humphreys,  
Leggett & Howington  
P.O. Box 5129  
Winston-Salem, NC  
27113-5129  
(919) 722-2300  
Admitted to NCSB: 1981  
Certified: 1988

**Robert E. Price, Jr.**  
Burns & Price  
NationsBank Bldg.  
Suite 450  
Winston-Salem, NC  
27101-3974  
(919) 722-8195  
Admitted to NCSB: 1980  
Certified: 1992

**Rory D. Whelehan**  
Womble, Carlyle,  
Sandridge & Rice  
P.O. Drawer 84  
Winston-Salem, NC  
27102  
(919) 721-3521  
(919) 721-3660  
Admitted to NCSB: 1989  
Certified: 1994

## Federal Criminal Law

### ASHEVILLE

**Sean P. Devereux**  
Whalen, Hay, Pitts,  
Hugenschmidt, Master,  
Devereux & Belser, P.A.  
137 Biltmore Ave.  
Asheville, NC 28801  
(704) 255-8085  
(704) 251-2760 (Fax)  
Admitted to NCSB: 1978  
Certified: 1992

### BEAUFORT

**John E. Nobles, Jr.**  
Wheatly, Wheatly, Nobles  
& Weeks  
P.O. Drawer 360  
Beaufort, NC 28516  
(919) 728-3158  
Admitted to NCSB: 1977  
Certified: 1991

### BURLINGTON

**H. Clay Hemric, Jr.**  
Hemric & Lambeth, P.A.  
P.O. Box 1714  
Burlington, NC  
27216-1714  
(919) 228-0501  
(919) 226-9552 (Fax)  
Admitted to NCSB: 1971  
Certified: 1994

**D. Thomas Lambeth, Jr.**  
Hemric & Lambeth, P.A.  
P.O. Box 1714  
Burlington, NC  
27216-1714  
(919) 228-0501  
(919) 226-9552  
Admitted to NCSB: 1985  
Certified: 1993

### CHAPEL HILL

**J. Kirk Osborn**  
600 Franklin Square  
1829 East Franklin Street  
Chapel Hill, NC 27514  
(919) 929-0987  
(919) 933-9233  
Admitted to NCSB: 1974  
Certified: 1994

**David S. Rudolf**  
Rudolf & Maher  
312 W. Franklin St.  
Chapel Hill, NC 27516  
(919) 967-4900  
Admitted to NCSB: 1979  
Certified: 1991

**Barry T. Winston**  
Winston & Massengale  
P.O. Box 793  
Chapel Hill, NC 27514

(919) 967-8553  
Admitted to NCSB: 1961  
Certified: 1991

### CHARLOTTE

**Harold J. Bender**  
200 N. McDowell St.  
Charlotte, NC 28204  
(704) 333-2169  
Admitted to NCSB: 1969  
Certified: 1991

**William M. Davis, Jr.**  
720 E. Fourth St.  
Suite 308  
Charlotte, NC 28202  
(704) 342-6830  
Admitted to NCSB: 1986  
Certified: 1991

**George V. Laughrun, II**  
Goodman, Carr, Nixon,  
Laughrun & Levine  
Cameron Brown Bldg.  
Suite 602  
301 S. McDowell St.  
Charlotte, NC 28204  
(704) 372-2770  
Admitted to NCSB: 1980  
Certified: 1991

**Charles L. Morgan**  
725 East Trade St.  
Suite 110  
Court Arcade Bldg.  
Charlotte, NC 28202  
(704) 334-9669  
Admitted to NCSB: 1981  
Certified: 1992

**Gary L. Murphy**  
Dozier, Miller, Pollard &  
Murphy  
701 E. Trade St.  
Charlotte, NC 28202  
(704) 372-6373  
Admitted to NCSB: 1974  
Certified: 1991

**Eben T. Rawls, III**  
Rawls, Dickinson &  
Ledford  
227 W. Trade St.  
Suite 2140  
Charlotte, NC 28202  
(704) 376-3200  
Admitted to NCSB: 1978  
Certified: 1991

**Henry M. Whitesides, Jr.**  
2500 Two First Union Ctr.  
Charlotte, NC 28282  
(704) 375-1431  
Admitted to NCSB: 1985  
Certified: 1991

### CLINTON

**John R. Parker, Jr.**  
P.O. Box 1089  
Clinton, NC 28328

(919) 592-3197  
Admitted to NCSB: 1961  
Certified: 1992

**W. Douglas Parsons**  
Johnson & Parsons  
P.O. Drawer 1400  
Clinton, NC 28328  
(919) 592-7066  
Admitted to NCSB: 1975  
Certified: 1991

### DURHAM

**Mark E. Edwards**  
P.O. Box 25291  
Durham, NC 27702  
(919) 560-3300  
Admitted to NCSB: 1989  
Certified: 1993

### GREENSBORO

**Locke T. Clifford**  
McNairy, Clifford &  
Clendenin  
127 N. Greene St.  
Suite 300  
Greensboro, NC 27401  
(919) 378-1212  
Admitted to NCSB: 1967  
Certified: 1991

**Robert H. Edmunds, Jr.**  
Stern, Graham & Klepfer  
P.O. Box 3112  
Greensboro, NC 27402  
(919) 373-1500  
(919) 272-8258  
Admitted to NCSB: 1975  
Certified: 1993

**Robert I. O'Hale**  
McNairy, Clifford &  
Clendenin  
Suite 300  
127 North Greene Street  
Greensboro, NC 27401  
(919) 378-1212  
(919) 333-9820 (Fax)  
Admitted to NCSB: 1981  
Certified: 1994

### HENDERSONVILLE

**Roy D. Neill**  
144 Third Avenue East  
Hendersonville, NC 28792  
(704) 697-8510  
Admitted to NCSB: 1985  
Certified: 1993

### HIGH POINT

**John D. Bryson**  
Wyatt, Early, Harris,  
Wheeler & Hauser, L.L.P.  
P.O. Drawer 2086  
High Point, NC 27261  
(919) 884-4444  
(919) 889-5232 (Fax)

Admitted to NCSB: 1985  
Certified: 1992

**Stanley F. Hammer**  
P.O. Box 2434  
High Point, NC 27261  
(910) 889-4442  
Admitted to NCSB: 1984  
Certified: 1993

**J. Randall May**  
P.O. Box 2434  
High Point, NC 27261  
(910) 889-4442  
Admitted to NCSB: 1974  
Certified: 1991

## HILLSBOROUGH

**J. Matthew Martin**  
Martin & Martin  
133 East King St.  
Hillsborough, NC 27278  
(919) 732-6112  
Admitted to NCSB: 1986  
Certified: 1993

## RALEIGH

**Robert D. Boyce**  
P.O. Box 26011  
Raleigh, NC 27611-6011  
(919) 834-2380  
(919) 834-2268 (Fax)  
Admitted to NCSB: 1984  
Certified: 1992

**Joseph B. Cheshire, V**  
Cheshire, Parker, Hughes  
& Manning  
P.O. Box 1029  
Raleigh, NC 27602  
(919) 833-3114  
Admitted to NCSB: 1973  
Certified: 1991

**L. Michael Dodd**  
Hall & Dodd  
P.O. Box 2211  
Raleigh, NC 27602  
(919) 833-4621  
Admitted to NCSB: 1977  
Certified: 1993

**Douglas E. Kingsbery**  
Tharrington, Smith &  
Hargrove  
P.O. Box 1151  
Raleigh, NC 27602  
(919) 821-4711  
Admitted to NCSB: 1980  
Certified: 1991

**Thomas C. Manning**  
Cheshire, Parker, Hughes  
& Manning  
P.O. Box 1029  
Raleigh, NC 27602  
(919) 833-3114  
Admitted to NCSB: 1977  
Certified: 1991

**Mary E. Manton**  
128 E. Hargett Street  
Raleigh, NC 27602  
(919) 856-4236  
Admitted to NCSB: 1985  
Certified: 1994

**Mary Ann Tally**  
P.O. Box 767  
Raleigh, NC 27602-0767  
(919) 832-1413  
Admitted to NCSB: 1974  
Certified: 1991

## ROCKY MOUNT

**Joseph M. Hester, Jr.**  
Moore, Diedrick, Carlisle  
& Hester  
P.O. Box 2626  
Rocky Mount, NC 27802  
(919) 977-1911  
Admitted to NCSB: 1977  
Certified: 1992

## SMITHFIELD

**John P. O'Hale**  
Narron, O'Hale &  
Whittington  
P.O. Box 1567  
Smithfield, NC 27577  
(919) 934-6021  
Admitted to NCSB: 1975  
Certified: 1992

## WINSTON-SALEM

**Charles J. Alexander, II**  
Morrow, Alexander, Tash  
& Long  
P.O. Box 25226  
Winston-Salem, NC  
27114-5226  
(910) 760-1400  
Admitted to NCSB: 1972  
Certified: 1991

**David B. Freedman**  
White & Crumpler  
11 West Fourth Street  
Winston-Salem, NC 27101  
(910) 725-1304  
Admitted to NCSB: 1982  
Certified: 1993

**Carl F. Parrish**  
Wright, Parrish, Newton &  
Rabil  
250 Executive Park Blvd.  
Suite 109  
Winston-Salem, NC 27103  
(910) 765-1600  
Admitted to NCSB: 1974  
Certified: 1993

## State Criminal Law

### ASHEVILLE

**Sean P. Devereux**  
Whalen, Hay, Pitts,  
Hugenschmidt, Master,  
Devereux & Belser, P.A.  
137 Biltmore Ave.  
Asheville, NC 28801  
(704) 255-8085  
(704) 251-2760 (Fax)  
Admitted to NCSB: 1978  
Certified: 1992

**Kate Dreher**  
P.O. Box 7158  
Asheville, NC 28802  
(704) 255-4727  
(704) 251-6257 (Fax)  
Admitted to NCSB: 1990  
Certified: 1994

**Ronald L. Moore**  
P.O. Box 7158  
Asheville, NC 28802  
(704) 255-4727  
(704) 251-6257  
Admitted to NCSB: 1981  
Certified: 1994

### BEAUFORT

**John E. Nobles, Jr.**  
Wheatly, Wheatly, Nobles  
& Weeks  
P.O. Drawer 360  
Beaufort, NC 28516  
(919) 728-3158  
Admitted to NCSB: 1977  
Certified: 1991

### BOONE

**Vincent L. Gable**  
827 West King Street  
Boone, NC 28607  
(704) 262-1155  
Admitted to NCSB: 1989  
Certified: 1993

### BURLINGTON

**H. Clay Hemric, Jr.**  
Hemric & Lambeth, P.A.  
445 S. Spring Street  
Burlington, NC 27215  
(910) 228-0501  
(910) 226-9552 (Fax)  
Admitted to NCSB: 1971  
Certified: 1994

**D. Thomas Lambeth, Jr.**  
Hemric & Lambeth, P.A.  
P.O. Box 1714  
Burlington, NC  
27216-1714  
(910) 228-0501  
(910) 226-9552  
Admitted to NCSB: 1985  
Certified: 1993

## CHAPEL HILL

**J. Kirk Osborn**  
600 Franklin Square  
1829 East Franklin Street  
Chapel Hill, NC 27514  
(919) 929-0987  
(919) 933-9233  
Admitted to NCSB: 1974  
Certified: 1994

**David S. Rudolf**  
Rudolf & Maher  
312 W. Franklin St.  
Chapel Hill, NC 27516  
(919) 967-4900  
Admitted to NCSB: 1979  
Certified: 1991

**Barry T. Winston**  
Winston & Massengale  
P.O. Box 793  
Chapel Hill, NC 27514  
(919) 967-8553  
Admitted to NCSB: 1961  
Certified: 1991

## CHARLOTTE

**Harold J. Bender**  
200 N. McDowell St.  
Charlotte, NC 28204  
(704) 333-2169  
Admitted to NCSB: 1969  
Certified: 1991

**William M. Davis, Jr.**  
720 E. Fourth St.  
Suite 308  
Charlotte, NC 28202  
(704) 342-6830  
Admitted to NCSB: 1986  
Certified: 1991

**George V. Laughrun, II**  
Goodman, Carr, Nixon,  
Laughrun & Levine  
Cameron Brown Bldg.  
Suite 602  
301 S. McDowell St.  
Charlotte, NC 28204  
(704) 372-2770  
Admitted to NCSB: 1980  
Certified: 1991

**Charles L. Morgan**  
725 East Trade St.  
Suite 110  
Court Arcade Bldg.  
Charlotte, NC 28202  
(704) 334-9669  
Admitted to NCSB: 1981  
Certified: 1992

**Gary L. Murphy**  
Dozier, Miller, Pollard &  
Murphy  
701 E. Trade St.  
Charlotte, NC 28202  
(704) 372-6373  
Admitted to NCSB: 1974  
Certified: 1991

**Eben T. Rawls, III**  
Rawls, Dickinson &  
Ledford  
923 Law Bldg.  
730 E. Trade St.  
Charlotte, NC 28202  
(704) 376-3200  
Admitted to NCSB: 1978  
Certified: 1991

**Henry M. Whitesides, Jr.**  
2500 Two First Union Ctr.  
Charlotte, NC 28282  
(704) 375-1431  
Admitted to NCSB: 1985  
Certified: 1991

## CLINTON

**John R. Parker, Jr.**  
P.O. Box 1089  
Clinton, NC 28328  
(910) 592-3197  
Admitted to NCSB: 1961  
Certified: 1992

**W. Douglas Parsons**  
Johnson & Parsons  
P.O. Box 1400  
Clinton, NC 28328  
(910) 592-7066  
Admitted to NCSB: 1975  
Certified: 1991

## DURHAM

**Mark E. Edwards**  
P.O. Box 25291  
Durham, NC 27702  
(919) 560-3300  
Admitted to NCSB: 1989  
Certified: 1993

## FRANKLIN

**James Y. Cabe**  
Cabe & Collins  
P.O. Box 1237  
Franklin, NC 28734  
(704) 524-9201  
Admitted to NCSB: 1970  
Certified: 1993

## GREENSBORO

**Locke T. Clifford**  
McNairy, Clifford &  
Clendenin  
127 N. Greene St.  
Suite 300  
Greensboro, NC 27401  
(910) 378-1212  
Admitted to NCSB: 1967  
Certified: 1991

**Robert H. Edmunds, Jr.**  
Stern, Graham & Klepfer  
P.O. Box 3112  
Greensboro, NC 27402  
(910) 373-1500  
Admitted to NCSB: 1975  
Certified: 1993

**Robert I. O'Hale**  
McNairy, Clifford &  
Clendenin  
Suite 300  
127 North Greene Street  
Greensboro, NC 27401  
(910) 378-1212  
(910) 333-9820 (Fax)  
Admitted to NCSB: 1981  
Certified: 1994

## GREENVILLE

**Mark A. Ward**  
P.O. Box 543  
Greenville, NC  
27835-0543  
(919) 752-7529  
Admitted to NCSB: 1987  
Certified: 1993

## HENDERSONVILLE

**J. Michael Edney**  
Prince, Youngblood,  
Massagee & Jackson  
240 Third Avenue, West  
Hendersonville, NC 28739  
(704) 692-2595  
Admitted to NCSB: 1985  
Certified: 1993

**Roy D. Neill**  
144 Third Avenue East  
Hendersonville, NC 28792  
(704) 697-8510  
Admitted to NCSB: 1985  
Certified: 1993

## HIGH POINT

**John D. Bryson**  
Wyatt, Early, Harris,  
Wheeler & Hauser, L.L.P.  
P.O. Drawer 2086  
High Point, NC 27261  
(910) 884-4444  
(910) 889-5232 (Fax)  
Admitted to NCSB: 1985  
Certified: 1992

**Stanley F. Hammer**  
P.O. Box 2434  
High Point, NC 27261  
(910) 889-4442  
Admitted to NCSB: 1984  
Certified: 1993

**J. Randall May**  
P.O. Box 2434  
High Point, NC 27261  
(910) 889-4442  
Admitted to NCSB: 1974  
Certified: 1991

## HILLSBOROUGH

**J. Matthew Martin**  
Martin & Martin  
133 East King St.  
Hillsborough, NC 27278  
(919) 732-6112

Admitted to NCSB: 1986  
Certified: 1993

## RALEIGH

**Robert D. Boyce**  
P.O. Box 26011  
Raleigh, NC 27611-6011  
(919) 834-2380  
(919) 834-2268 (Fax)  
Admitted to NCSB: 1984  
Certified: 1992

**Joseph B. Cheshire, V**  
Cheshire, Parker, Hughes  
& Manning  
P.O. Box 1029  
Raleigh, NC 27602  
(919) 833-3114  
Admitted to NCSB: 1973  
Certified: 1991

**Douglas W. Corkhill**  
P.O. Box 1854  
Raleigh, NC 27602  
(919) 834-7222  
Admitted to NCSB: 1983  
Certified: 1994

**L. Michael Dodd**  
Hall & Dodd  
P.O. Box 2211  
Raleigh, NC 27602  
(919) 833-4621  
Admitted to NCSB: 1977  
Certified: 1993

**Douglas E. Kingsbery**  
Tharrington, Smith &  
Hargrove  
P.O. Box 1151  
Raleigh, NC 27602  
(919) 821-4711  
Admitted to NCSB: 1980  
Certified: 1991

**Thomas C. Manning**  
Cheshire, Parker, Hughes  
& Manning  
P.O. Box 1029  
Raleigh, NC 27602  
(919) 833-3114  
Admitted to NCSB: 1977  
Certified: 1991

**Mary E. Manton**  
128 E. Hargett Street  
Raleigh, NC 27602  
(919) 856-4236  
Admitted to NCSB: 1985  
Certified: 1994

**Mary Ann Tally**  
P.O. Box 767  
Raleigh, NC 27602-0767  
(919) 832-1413  
Admitted to NCSB: 1974  
Certified: 1991

## ROCKY MOUNT

**Joseph M. Hester, Jr.**  
Moore, Diedrick, Carlisle  
& Hester  
P.O. Box 2626  
Rocky Mount, NC 27802  
(919) 977-1911  
Admitted to NCSB: 1977  
Certified: 1992

## SMITHFIELD

**John P. O'Hale**  
Narron, O'Hale &  
Whittington  
P.O. Box 1567  
Smithfield, NC 27577  
(919) 934-6021  
Admitted to NCSB: 1975  
Certified: 1992

## SPRING HOPE

**Terry W. Alford**  
P.O. Box 940  
Spring Hope, NC 27882  
(919) 478-5123  
Admitted to NCSB: 1980  
Certified: 1993

## WINSTON-SALEM

**Charles J. Alexander, II**  
Morrow, Alexander, Tash  
& Long  
P.O. Box 25226  
Winston-Salem, NC  
27114-5226  
(910) 760-1400  
Admitted to NCSB: 1972  
Certified: 1991

**David B. Freedman**  
White & Crumpler  
11 West Fourth Street  
Winston-Salem, NC 27101  
(910) 725-1304  
Admitted to NCSB: 1982  
Certified: 1993

**Carl F. Parrish**  
Wright, Parrish, Newton &  
Rabil  
250 Executive Park Blvd.  
Suite 109  
Winston-Salem, NC 27103  
(910) 765-1600  
Admitted to NCSB: 1974  
Certified: 1993

## Criminal Appellate Practice

## CHAPEL HILL

**J. Kirk Osborn**  
600 Franklin Square  
1829 East Franklin Street  
Chapel Hill, NC 27514

(919) 929-0987  
(919) 933-9233  
Admitted to NCSB: 1974  
Certified: 1994

## GREENSBORO

**Robert H. Edmunds, Jr.**  
Stern, Graham & Klepfer  
P.O. Box 3112  
Greensboro, NC 27402  
(910) 373-1500  
(910) 272-8258  
Admitted to NCSB: 1975  
Certified: 1994

## HIGH POINT

**John D. Bryson**  
Wyatt, Early, Harris,  
Wheeler & Hauser, L.L.P.  
P.O. Drawer 2086  
High Point, NC 27261  
(910) 884-4444  
(910) 889-5232 (Fax)  
Admitted to NCSB: 1985  
Certified: 1994

**Stanley F. Hammer**  
P.O. Box 2434  
High Point, NC 27261  
(910) 889-4442  
Admitted to NCSB: 1984  
Certified: 1994

## HILLSBOROUGH

**J. Matthew Martin**  
Martin & Martin, P.A.  
133 East King Street  
Hillsborough, NC 27278  
(919) 732-6112  
(919) 732-1585  
Admitted to NCSB: 1986  
Certified: 1994

## Estate Planning and Probate Law

## ABERDEEN

**W. Y. Alex Webb**  
P.O. Box 1437  
Aberdeen, NC 28315  
(910) 944-9555  
(910) 944-7641 (Fax)  
Admitted to NCSB: 1973  
Certified: 1987

## ASHEVILLE

**R. Walton Davis, III**  
P.O. Box 1946  
Asheville, NC 28802  
(704) 254-3696  
Admitted to NCSB: 1985  
Certified: 1993

**Brian F. Lavelle**  
Van Winkle, Buck, Wall,  
Starnes & Davis  
P.O. Box 7376  
Asheville, NC 28802  
(704) 258-2991  
(704) 255-0255 (Fax)  
Admitted to NCSB: 1966  
Certified: 1987

**Doris P. Loomis**  
McGuire, Wood &  
Bissette, P.A.  
P.O. Box 3180  
Asheville, NC 28802  
(704) 254-8806  
(704) 252-2438 (Fax)  
Admitted to the NCSB:  
1981  
Certified: 1988

**Michael L. Miller**  
P.O. Box 2983  
Asheville, NC 28802  
(704) 251-1200  
Admitted to NCSB: 1980  
Certified: 1987

## CHAPEL HILL

**David R. Frankstone**  
Higgins, Frankstone,  
Graves & Morris  
P.O. Drawer 2869  
Chapel Hill, NC  
27515-2869  
(919) 968-4717  
Admitted to NCSB: 1975  
Certified: 1988

**Marcus Hudson**  
Bayliss, Hudson & Merritt  
P.O. Drawer 389  
Chapel Hill, NC 27514  
(919) 942-5191  
Admitted to NCSB: 1965  
Certified: 1993

## CHARLOTTE

**Richard A. Bigger**  
Weinstein & Sturges  
1100 S. Tryon St.  
Charlotte, NC 28203  
(704) 372-4800  
Admitted to NCSB: 1964  
Certified: 1987

**Herbert H. Browne, Jr.**  
Smith, Helms, Mulliss &  
Moore  
P.O. Box 31247  
Charlotte, NC 28231  
(704) 343-2000  
Admitted to NCSB: 1958  
Certified: 1987

**John J. Carpenter**  
Culp, Elliott & Carpenter  
227 W. Trade St.  
Suite 1500  
Charlotte, NC 28202

(704) 372-6322  
Admitted to NCSB: 1984  
Certified: 1992

**William R. Culp, Jr.**  
Culp, Elliott & Carpenter  
227 W. Trade St.  
Suite 1500  
Charlotte, NC 28202  
(704) 372-6322  
Admitted to NCSB: 1980  
Certified: 1992

**Debra L. Foster**  
Parker, Poe, Adams &  
Bernstein  
2600 Charlotte Plaza  
Charlotte, NC 28244  
(704) 372-9000  
Admitted to NCSB: 1982  
Certified: 1989

**Jonathan S. Frank**  
6825 Van de Rohe Drive  
Charlotte, NC 28215  
(704) 532-0288  
Admitted to NCSB: 1989  
Certified: 1994

**Julie Z. Griggs**  
Smith, Helms, Mulliss &  
Moore  
227 N. Tryon St.  
Charlotte, NC 28202  
(704) 343-2000  
Admitted to NCSB: 1987  
Certified: 1992

**Robert C. Gunst**  
Gunst & Gunst  
Two Fairview Plaza  
Suite 706  
5950 Fairview Rd.  
Charlotte, NC 28210-3104  
(704) 554-9021  
Admitted to NCSB: 1980  
Certified: 1987

**C. Wells Hall, III**  
Moore & Van Allen  
NationsBank Corporate  
Center  
100 N. Tryon Street, 47th  
Floor  
Charlotte, NC 28202  
(704) 331-1000  
Admitted to NCSB: 1973  
Certified: 1987

**Joseph B. Henninger, Jr.**  
Wishart, Norris,  
Henninger & Pittman  
6832 Morrison Blvd.  
Charlotte, NC 28211  
(704) 364-0010  
Admitted to NCSB: 1979  
Certified: 1992

**Graham D. Holding**  
Robinson, Bradshaw &  
Hinson  
1900 Independence Ctr.

Charlotte, NC 28246  
(704) 377-2536  
Admitted to NCSB: 1964  
Certified: 1987

**Richard E. Marsh**  
227 West Trade St.  
The Carillon, Suite 1925  
Charlotte, NC 28202  
(704) 372-1112  
Admitted to NCSB: 1981  
Certified: 1993

**Nell G. McBryde**  
Moore & Van Allen  
NationsBank Corp.  
100 N. Tryon St.  
Floor 47  
Charlotte, NC 28202-4003  
(704) 331-1000  
Admitted to NCSB: 1969  
Certified: 1987

**Edward G. McGoogan, Jr.**  
Smith, Helms, Mulliss &  
Moore  
227 N. Tryon St.  
Charlotte, NC 28202  
(704) 343-2046  
Admitted to NCSB: 1974  
Certified: 1992

**Ann M. Neill**  
Johnson, Taylor, Allison  
& Hord  
P.O. Box 36469  
Charlotte, NC 28236  
(704) 332-1181  
Admitted to NCSB: 1987  
Certified: 1992

**Richard A. Orsbon**  
Parker, Poe, Adams &  
Bernstein  
4201 Congress St.  
Suite 145  
Charlotte, NC 28209  
(704) 556-9600  
Admitted to NCSB: 1972  
Certified: 1987

**Christy E. Reid**  
Robinson, Bradshaw &  
Hinson  
101 N. Tryon St.  
Suite 1900  
Charlotte, NC 28246  
(704) 377-2536  
(704) 378-4000 (Fax)  
Admitted to NCSB: 1976  
Certified: 1987

## CONCORD

**William L. Mills, III**  
P.O. Box 528  
Concord, NC 28026-0528  
(704) 782-3315  
Admitted to NCSB: 1980  
Certified: 1989

**Starkey Sharp, V**  
Hartsell, Hartsell & Mills  
P.O. Box 368  
Concord, NC 28025  
(704) 786-5161  
Admitted to NCSB: 1982  
Certified: 1992

## DURHAM

**William V. McPherson, Jr.**  
806 University Tower  
Durham, NC 27707  
(919) 493-0584  
(919) 493-0856 (Fax)  
Admitted to NCSB: 1969  
Certified: 1994

**Billy M. Sessoms**  
Haywood, Denny, Miller,  
Johnson, Sessoms &  
Patrick  
P.O. Box 451  
Durham, NC 27702  
(919) 682-5747  
Admitted to NCSB: 1961  
Certified: 1993

**Edwin J. Walker, Jr.**  
King, Walker, Lambe &  
Crabtree  
P.O. Box 51549  
Durham, NC 27717-1549  
(919) 493-8411  
(919) 493-2047 (Fax)  
Admitted to NCSB: 1969  
Certified: 1990

## FAYETTEVILLE

**Robert G. Ray**  
Rose, Ray, Winfrey,  
O'Connor & Leslie  
P.O. Box 1239  
Fayetteville, NC 28302  
(910) 483-2101  
(910) 483-8444 (Fax)  
Admitted to NCSB: 1968  
Certified: 1987

## GASTONIA

**John H. Griffing**  
Alala, Mullen, Holland &  
Cooper  
P.O. Box 488  
Gastonia, NC 28053  
(704) 864-6751  
Admitted to NCSB: 1988  
Certified: 1993

## GOLDSBORO

**John C. Hine**  
Baddour, Parker, Hine &  
Wellons  
P.O. Drawer 916  
Greensboro, NC 27533-0916  
(919) 735-7275  
Admitted to NCSB: 1974  
Certified: 1987

## GREENSBORO

**Joseph S. Atwell**  
Carruthers & Roth  
P.O. Box 540  
Greensboro, NC 27402  
(910) 379-8651  
Admitted to NCSB: 1984  
Certified: 1992

**Michael H. Godwin**  
Adams, Kleemeier, Hagan,  
Hannah & Fouts  
P.O. Box 3463  
Greensboro, NC 27402  
(910) 373-1600  
Admitted to NCSB: 1974  
Certified: 1987

**Charles B. Hahn**  
Turner, Enochs & Lloyd  
P.O. Box 160  
Greensboro, NC  
27402-0160  
(910) 373-1300  
Admitted to NCSB: 1971  
Certified: 1987

**Jo Ann T. Harlee**  
Smith, Helms, Mulliss &  
Moore  
P.O. Box 21927  
Greensboro, NC 27420  
(910) 378-5200  
Admitted to NCSB: 1978  
Certified: 1987

**Bradley L. Jacobs**  
Tuggle, Duggins &  
Meschan, P.A.  
P.O. Box 2888  
Greensboro, NC 27402  
(910) 378-1431  
(910) 274-1148 (Fax)  
Admitted to NCSB: 1986  
Certified: 1994

**Ronald P. Johnson**  
Nichols, Caffrey, Hill,  
Evans & Murrelle  
P.O. Box 989  
Greensboro, NC  
27402-0989  
(910) 379-1390  
Admitted to NCSB: 1974  
Certified: 1987

**Paul H. Livingston, Jr.**  
Schell, Bray, Aycock, Abel  
& Livingston  
P.O. Box 21847

Greensboro, NC 27420  
(910) 370-8800  
Admitted to NCSB: 1971  
Certified: 1987

**Robert B. Lloyd, Jr.**  
Turner, Enochs & Lloyd  
P.O. Box 160  
Greensboro, NC  
27402-0160  
(910) 373-1300  
Admitted to NCSB: 1950  
Certified: 1987

**George G. Lockhart**  
3200 Northline Avenue  
Suite 628-B  
Greensboro, NC 27408  
(910) 852-8624  
(910) 852-8625 (Fax)  
Admitted to NCSB: 1972  
Certified: 1994

**Peter J. Miller**  
Turner, Enochs & Lloyd,  
P.A.  
P.O. Box 160  
Greensboro, NC 27402  
(910) 373-1300  
(910) 273-9353 (Fax)  
Admitted to NCSB: 1983  
Certified: 1994

**Seldon E. Patty**  
Carruthers & Roth  
P.O. Box 540  
Greensboro, NC 27402  
(910) 379-8651  
Admitted to NCSB: 1968  
Certified: 1987

**Martha T. Peddrick**  
Nichols, Caffrey, Hill,  
Evans & Murrelle  
P.O. Box 989  
Greensboro, NC 27402  
(910) 379-1390  
Admitted to NCSB: 1984  
Certified: 1991

**Barbara C. Ruby**  
Tuggle, Duggins &  
Meschan  
P.O. Drawer X  
Greensboro, NC 27402  
(910) 378-1431  
Admitted to NCSB: 1976  
Certified: 1987

**Thomas W. Sinks**  
Carruthers & Roth  
P.O. Box 540  
Greensboro, NC 27402  
(910) 379-8651  
Admitted to NCSB: 1976  
Certified: 1987

## GREENVILLE

**Michael A. Colombo**  
Colombo, Kitchin &  
Johnson  
P.O. Box 7143

Greenville, NC  
27835-7143  
(919) 758-1200  
Admitted to NCSB: 1979  
Certified: 1987

## HENDERSONVILLE

**Robert H. Haggard**  
Van Winkle, Buck, Wall,  
Starnes & Davis, P.A.  
422 South Main Street  
Hendersonville, NC 28792  
(704) 697-6196  
(704) 693-3999 (Fax)  
Admitted to NCSB: 1974  
Certified: 1987

**Scott E. Lebensburger**  
211 N. Main St.  
Hendersonville, NC 28792  
(704) 692-4333  
Admitted to NCSB: 1978  
Certified: 1987

## HICKORY

**Charles D. Dixon**  
Patrick, Harper & Dixon  
P.O. Box 218  
Hickory, NC 28603  
(704) 322-7741  
Admitted to NCSB: 1952  
Certified: 1987

## HIGH POINT

**Calvin B. Bryant**  
Wyatt, Early, Harris,  
Wheeler & Hauser  
P.O. Drawer 2086  
High Point, NC  
27261-2086  
(910) 884-4444  
Admitted to NCSB: 1955  
Certified: 1989

**Ann E. Hanks**  
Wyatt, Early, Harris,  
Wheeler & Hauser, L.L.P.  
P.O. Drawer 2086  
High Point, NC  
27261-2086  
(910) 884-4444  
(910) 889-5232 (Fax)  
Admitted to NCSB: 1979  
Certified: 1993

## KINSTON

**C. Gray Johnsey**  
White & Allen  
P.O. Box 3169  
Kinston, NC 28502-3169  
(919) 527-8000  
Admitted to NCSB: 1978  
Certified: 1987

## NEW BERN

**Thomas R. Crawford**  
Ward & Smith

P.O. Box 867  
New Bern, NC 28560-0867  
(919) 633-1000  
Admitted to NCSB: 1972  
Certified: 1987

**David S. Evans**  
Ward & Smith  
P.O. Box 867  
New Bern, NC 28560-0867  
(919) 633-1000  
Admitted to NCSB: 1958  
Certified: 1987

**Joanne K. Partin**  
Ward & Smith, P.A.  
P.O. Box 867  
New Bern, NC  
28563-0867  
(919) 633-1000  
(919) 636-2121 (Fax)  
Admitted to NCSB: 1981  
Certified: 1994

## OXFORD

**Thomas S. Royster, Jr.**  
Royster, Royster, Cross &  
Thorpe  
P.O. Box 1166  
Oxford, NC 27565-1166  
(919) 693-3131  
Admitted to NCSB: 1961  
Certified: 1990

## RALEIGH

**Lawrence E. Bolton**  
Boxley, Bolton & Garber  
P.O. Drawer 1429  
Raleigh, NC 27602-1429  
(919) 832-3915  
Admitted to NCSB: 1971  
Certified: 1987

**R. Daniel Brady**  
Merriman, Nicholls &  
Crampton, P.A.  
P.O. Box 18237  
Raleigh, NC 27619  
(919) 781-1311  
(919) 782-0465 (Fax)  
Admitted to NCSB: 1982  
Certified: 1994

**Madison E. Bullard, Jr.**  
Wyrick, Robbins, Yates &  
Ponton  
4101 Lake Boone Trail  
Suite 300  
Raleigh, NC 27607  
(919) 781-4000  
(919) 781-4865  
Admitted to NCSB: 1981  
Certified: 1994

**Stephen T. Byrd**  
Manning, Fulton &  
Skinner, P.A.  
P.O. Box 20389  
Raleigh, NC 27619-0389  
(919) 787-8880

(919) 787-8902 (Fax)  
Admitted to NCSB: 1984  
Certified: 1994

**Jean G. Carter**  
Hunton & Williams  
P.O. Box 109  
Raleigh, NC 27602  
(919) 899-3000  
Admitted to NCSB: 1983  
Certified: 1989

**Carl W. Hibbert**  
Smith, Debnam, Hibbert &  
Pahl  
P.O. Drawer 26268  
Raleigh, NC 27611  
(919) 250-2000  
Admitted to NCSB: 1972  
Certified: 1989

**Nancy S. Rendleman**  
Maupin, Taylor, Ellis &  
Adams  
P.O. Drawer 19764  
Raleigh, NC 27619  
(919) 981-4000  
Admitted to NCSB: 1981  
Certified: 1987

## REIDSILLE

**Frederick C. E. Murray**  
Robinson & Murray  
416 South Main St.  
Reidsville, NC 27320  
(919) 342-0347  
Admitted to NCSB: 1973  
Certified: 1992

## ROCKY MOUNT

**Jeff D. Batts**  
Batts & Batts  
P.O. Box 4847  
Rocky Mount, NC 27803  
(919) 977-6450  
Admitted to NCSB: 1957  
Certified: 1987

## SALISBURY

**Thomas M. Caddell**  
Shuford & Caddell  
P.O. Box 198  
Salisbury, NC 28145-0198  
(704) 636-8050  
Admitted to NCSB: 1974  
Certified: 1987

## SMITHFIELD

**James W. Narron**  
Narron, O'Hale &  
Whittington  
P.O. Box 1567  
Smithfield, NC 27577  
(919) 934-6021  
Admitted to NCSB: 1975  
Certified: 1987

## SOUTHERN PINES

**H. Chalk Broughton, Jr.**  
Broughton & Broughton  
P.O. Box 371  
Southern Pines, NC 28388  
(910) 692-6866  
(910) 695-3036 (Fax)  
Admitted to NCSB: 1988  
Certified: 1994

**Robert S. Thompson**  
Pollock, Fullenwider,  
Patterson & Thompson,  
P.A.  
P.O. Box 540  
Southern Pines, NC 28387  
(910) 692-7811  
(910) 692-8051 (Fax)  
Admitted to NCSB: 1983  
Certified: 1994

## WILMINGTON

**Matthew T. Dill**  
P.O. Box 483  
Wilmington, NC 28480  
(910) 256-9700  
Admitted to NCSB: 1986  
Certified: 1992

## WINSTON-SALEM

**William D. Harper**  
Bell, Davis & Pitt  
P.O. Box 21029  
Winston-Salem, NC 27120  
(910) 722-3700  
Admitted to NCSB: 1975  
Certified: 1987

**Robert D. Hinshaw**  
1100 S. Stratford Rd.  
Suite 122  
Winston-Salem, NC 27103  
(910) 760-2000  
Admitted to NCSB: 1977  
Certified: 1991

**Cowles Liipfert**  
Craige, Brawley, Liipfert,  
Walker & Searcy  
P.O. Box 1666  
Winston-Salem, NC 27102  
(910) 725-0583  
Admitted to NCSB: 1964  
Certified: 1988

**Edward E. Raymer, Jr.**  
Allman, Spry, Humphreys,  
Leggett & Howington  
P.O. Drawer 5129  
Winston-Salem, NC  
27113-5129  
(910) 722-2300  
Admitted to NCSB: 1974  
Certified: 1988

## Real Property Law: Business, Commercial, and Industrial Transactions

## ASHEVILLE

**Steven I. Goldstein**  
Patla, Straus, Robinson &  
Moore  
P.O. Box 7625  
Asheville, NC 28802-7625  
(704) 255-7641  
Admitted to NCSB: 1967  
Certified: 1987

**Douglas O. Thigpen**  
McGuire, Wood & Bissette  
P.O. Box 3180  
Asheville, NC 28802  
(704) 254-8806  
Admitted to NCSB: 1976  
Certified: 1987

## BANNER ELK

**John M. Wright**  
P.O. Box 725  
Banner Elk, NC  
28604-0725  
(704) 898-9761  
Admitted to NCSB: 1979  
Certified: 1988

## BURLINGTON

**Charles T. Steele, Jr.**  
Wishart, Norris,  
Henninger & Pittman,  
P.A.  
P.O. Drawer 1998  
Burlington, NC  
27216-1998  
(910) 584-3388  
(910) 584-4487 (Fax)  
Admitted to NCSB: 1987  
Certified: 1994

## CHAPEL HILL

**David H. Bland**  
P.O. Box 2267  
Chapel Hill, NC 27514  
(919) 967-5493  
Admitted to NCSB: 1978  
Certified: 1990

## CHARLOTTE

**Pender R. McElroy**  
James, McElroy & Diehl  
600 S. College St.  
Charlotte, NC 28202  
(704) 372-9870  
Admitted to NCSB: 1968  
Certified: 1989

**Gibson L. Smith, Jr.**  
Robinson, Bradshaw &  
Hinson

1900 Independence Ctr.  
Charlotte, NC 28246  
(704) 377-2536  
Admitted to NCSB: 1965  
Certified: 1989

**Brent A. Torstrick**  
Robinson, Bradshaw &  
Hinston, P.A.  
1900 Independence Center  
101 N. Tryon Street  
Charlotte, NC 28246  
(704) 377-8305  
(704) 378-4000 (Fax)  
Admitted to NCSB: 1983  
Certified: 1994

**Leslie M. Webb**  
Perry, Patrick, Farmer &  
Michaux  
2200 The Carillon  
227 West Trade St.  
Charlotte, NC 28202  
(704) 372-1120  
Admitted to NCSB: 1985  
Certified: 1992

## DURHAM

**Charles A. Reinhardt, Jr.**  
Poe, Hoff & Reinhardt  
P.O. Box 825  
Durham, NC 27702  
(919) 687-4050  
Admitted to NCSB: 1976  
Certified: 1993

## ELIZABETH CITY

**Thomas P. Nash, IV**  
Trimpi & Nash  
P.O. Box 768  
Elizabeth City, NC  
27907-0768  
(919) 338-0104  
Admitted to NCSB: 1979  
Certified: 1989

**G. Elvin Small**  
Abbott, Mullen, Brumsey  
& Small  
P.O. Box 69  
Elizabeth city, NC 27907  
(919) 335-5442  
Admitted to NCSB: 1977  
Certified: 1988

## GOLDSBORO

**Chloe J. Wellons**  
Baddour, Parker, Hine &  
Wellons, P.C.  
P.O. Drawer 916  
Goldsboro, NC 27533  
(919) 735-7285  
(919) 736-3297 (Fax)  
Admitted to NCSB: 1986  
Certified: 1994

## GREENSBORO

**John R. Barlow, II**  
Tuggle, Duggins &  
Meschan  
P.O. Drawer X  
Greensboro, NC 27402  
(910) 378-1431  
Admitted to NCSB: 1970  
Certified: 1987

**Howard L. Borum**  
Carruthers & Roth  
P.O. Box 540  
Greensboro, NC 27402  
(910) 379-8651  
Admitted to NCSB: 1980  
Certified: 1987

**M. Jay DeVaney**  
Adams, Kleemeier, Hagan,  
Hannah & Fouts  
P.O. Box 3463  
Greensboro, NC  
27402-3463  
(910) 373-1600  
Admitted to NCSB: 1971  
Certified: 1987

**Charles E. Melvin, Jr.**  
Smith, Helms, Mullis &  
Moore  
P.O. Box 21927  
Greensboro, NC 27420  
(910) 378-5200  
Admitted to NCSB: 1956  
Certified: 1987

## GREENVILLE

**Gary B. Davis**  
Mattox, Davis & Barnhill  
P.O. Drawer 686  
Greenville, NC 27835  
(919) 758-3430  
Admitted to NCSB: 1975  
Certified: 1991

## HICKORY

**Terry M. Taylor**  
Tate, Young, Morphis,  
Bach & Farthing  
P.O. Drawer 2428  
Hickory, NC 28603  
(704) 322-4663  
(704) 322-2023 (Fax)  
Admitted to NCSB: 1984  
Certified: 1993

## KILL DEVIL HILLS

**Daniel D. Khoury**  
Aldridge, Seawell &  
Khoury  
P.O. Box 1584  
Kill Devil Hills, NC 27948  
(919) 441-2191  
Admitted to NCSB: 1977  
Certified: 1988

## KITTY HAWK

**Norman W. Shearin, Jr.**  
P.O. Box 1042  
Kitty Hawk, NC 27949  
(919) 261-5055  
Admitted to NCSB: 1971  
Certified: 1990

## NAGS HEAD

**Robert B. Hobbs, Jr.**  
Hornthal, Riley, Ellis &  
Maland  
P.O. Box 310  
Nags Head, NC  
27959-0310  
(919) 441-0871  
Admitted to NCSB: 1986  
Certified: 1992

## PINEHURST

**Lu Pendleton Hayes**  
Van Camp, West, Hayes  
& Meacham, P.A.  
P.O. Box 1389  
Pinehurst, NC 28374  
(910) 295-2525  
(910) 295-2001 (Fax)  
Admitted to NCSB: 1984  
Certified: 1994

## RALEIGH

**J. Clark Brewer**  
Young, Moore, Henderson  
& Alvis, P.A.  
P.O. Box 31627  
Raleigh, NC 27622  
(919) 782-6860  
(919) 782-6753 (Fax)  
Admitted to NCSB: 1967  
Certified: 1988

**David R. Dorton**  
Maupin, Taylor, Ellis &  
Adams  
P.O. Box 19764  
Raleigh, NC 27619  
(919) 981-4000  
Admitted to NCSB: 1979  
Certified: 1990

**Charles L. Fulton**  
Manning, Fulton &  
Skinner  
P.O. Box 20389  
Raleigh, NC 27619-0389  
(919) 787-8880  
Admitted to NCSB: 1950  
Certified: 1987

**William H. McCullough**  
Parker, Poe, Adams &  
Bernstein  
P.O. Box 389  
Raleigh, NC 27602-0389  
(919) 828-0546  
Admitted to NCSB: 1959  
Certified: 1988

**Samuel T. Oliver, Jr.**  
Manning, Fulton &  
Skinner  
P.O. Box 20389  
Raleigh, NC 27619-0389  
(919) 787-8880  
Admitted to NCSB: 1979  
Certified: 1987

**James K. Pendergrass**  
Reynolds & Pendergrass  
316 West Edenton St.  
Raleigh, NC 27603  
(919) 832-4110  
Admitted to NCSB: 1987  
Certified: 1992

**Steven I. Reinhard**  
Johnson, Gamble, Mercer,  
Hearn & Vinegar  
P.O. Box 1776  
Raleigh, NC 27602  
(919) 832-8396  
Admitted to NCSB: 1985  
Certified: 1993

**David J. Witheft**  
Manning, Fulton &  
Skinner  
P.O. Box 20389  
Raleigh, NC 27619-0389  
(919) 787-8880  
Admitted to NCSB: 1986  
Certified: 1990

**Christopher M. Wyne**  
Monroe, Wyne & Lennon,  
P.A.  
178 Mine Lake Ct.  
Raleigh, NC 27615  
(919) 848-8500  
(919) 870-1449 (Fax)  
Admitted to NCSB: 1975  
Certified: 1989

## ROCKY MOUNT

**Harold D. Colston**  
P.O. Box 8446  
Rocky Mount, NC 27804  
(919) 985-1701  
Admitted to NCSB: 1967  
Certified: 1989

## SOUTHERN PINES

**Robert S. Thompson**  
Pollock, Fullenwider,  
Patterson & Thompson  
P.O. Box 540  
Southern Pines, NC 28388  
(910) 692-7811  
Admitted to NCSB: 1983  
Certified: 1992

## WAYNESVILLE

**Leon M. Killian**  
Killian, Kersten, Patton &  
Ellis  
P.O. Drawer 1260

Waynesville, NC  
28786-1260  
(704) 452-5801  
Admitted to NCSB: 1969  
Certified: 1989

## WILMINGTON

**Kenneth A. Shanklin**  
P.O. Box 1347  
Wilmington, NC  
28402-1347  
(910) 762-9400  
Admitted to NCSB: 1973  
Certified: 1991

## WINSTON-SALEM

**Alfred G. Adams**  
Petree, Stockton, L.L.P.  
1001 West Fourth Street  
Winston-Salem, NC  
27101  
(910) 607-7448  
Admitted to NCSB: 1973  
Certified: 1987

**Richard E. Glaze**  
Petree & Stockton  
1001 W. Fourth St.  
Winston-Salem, NC 27101  
(910) 725-2351  
Admitted to NCSB: 1957  
Certified: 1987

**Robert H. Sapp**  
Sapp, Mast & Stroud  
120 W. Third St.  
Winston-Salem, NC  
27101-3902  
(910) 722-7158  
Admitted to NCSB: 1957  
Certified: 1989

**Philip E. Searcy**  
Craig, Brawley, Liipfert  
& Ross  
P.O. Box 1666  
Winston-Salem, NC  
27102-1666  
(910) 725-0583  
Admitted to NCSB: 1981  
Certified: 1993

**Donald M. VonCannon**  
Allman, Spry, Humphreys,  
Leggett & Howington  
P.O. Drawer 5129  
Winston-Salem, NC  
27113-5129  
(910) 722-2300  
Admitted to NCSB: 1971  
Certified: 1988

## **Real Property Law: Residential Transactions**

### **ASHEVILLE**

**Stephen L. Barden, III**  
Ball, Barden, Contrivo &  
Bell

P.O. Box 7157  
Asheville, NC 28802  
(704) 252-0682  
Admitted to NCSB: 1974  
Certified: 1987

**Steven I. Goldsteln**  
Patla, Straus, Robinson &  
Moore  
P.O. Box 7625  
Asheville, NC 28802-7625  
(704) 255-7641  
Admitted to NCSB: 1967  
Certified: 1987

**John R. Rose**  
Van Winkle, Buck, Wall,  
Starnes & Davis  
P.O. Box 7376  
Asheville, NC 28802  
(704) 258-2991  
Admitted to NCSB: 1988  
Certified: 1993

**Douglas O. Thigpen**  
McGuire, Wood & Bisette  
P.O. Box 3180  
Asheville, NC 28802  
(704) 254-8806  
Admitted to NCSB: 1976  
Certified: 1987

**Sheryl H. Williams**  
Roberts, Stevens &  
Cogburn  
P.O. Box 7647  
Asheville, NC 28802  
(704) 252-6600  
Admitted to NCSB: 1980  
Certified: 1987

### **BANNER ELK**

**John M. Wright**  
P.O. Box 725  
Banner Elk, NC 28604-075  
(704) 898-9761  
Admitted to NCSB: 1979  
Certified: 1988

### **BURLINGTON**

**Charles T. Steele, Jr.**  
Wishart, Norris,  
Henninger & Pittman,  
P.A.  
P.O. Drawer 1998  
Burlington, NC  
27216-1998  
(910) 584-3388  
(910) 584-4487 (Fax)

Admitted to NCSB: 1987  
Certified: 1994

### **CHARLOTTE**

**Pender R. McElroy**  
James, McElroy & Diehl  
600 S. College St.  
Charlotte, NC 28202  
(704) 372-9870  
Admitted to NCSB: 1968  
Certified: 1989

**Leslie M. Webb**  
Perry, Patrick, Farmer &  
Michaux  
2200 The Carillon  
227 West Trade St.  
Charlotte, NC 28202  
(704) 372-1120  
Admitted to NCSB: 1985  
Certified: 1992

### **DURHAM**

**Charles A. Reinhardt, Jr.**  
Poe, Hoff & Reinhardt  
P.O. Box 825  
Durham, NC 27702  
(919) 687-4050  
Admitted to NCSB: 1976  
Certified: 1993

### **EDEN**

**Joseph G. Maddrey**  
Maddrey, Medlin & Stone  
P.O. Box 507  
Eden, NC 27288  
(910) 623-4491  
Admitted to NCSB: 1967  
Certified: 1991

### **ELIZABETH CITY**

**Thomas P. Nash, IV**  
Trimpi & Nash  
P.O. Box 768  
Elizabeth City, NC  
27907-0768  
(919) 338-0104  
Admitted to NCSB: 1979  
Certified: 1989

**J. Fred Riley**  
Hornthal, Riley, Ellis &  
Maland  
P.O. Box 220  
Elizabeth City, NC 27907  
(919) 335-0871  
Admitted to NCSB: 1967  
Certified: 1987

**G. Elvin Small**  
Abbott, Mullen, Brumsey  
& Small  
P.O. Box 69  
Elizabeth City, NC 27907  
(919) 335-5442  
Admitted to NCSB: 1977  
Certified: 1988

### **FAYETTEVILLE**

**Jeff Dunham**  
McCoy, Weaver, Wiggins,  
Cleveland & Raper  
500 N. McPherson Church  
Rd.  
Fayetteville, NC 28303  
(910) 438-8305  
(910) 867-6576 (Fax)  
Admitted to NCSB: 1985  
Certified: 1994

### **GOLDSBORO**

**Chloe J. Wellons**  
Baddour, Parker, Hine &  
Wellons  
P.O. Drawer 916  
Goldsboro, NC  
27533-0916  
(919) 735-7275  
Admitted to NCSB: 1986  
Certified: 1991

### **GREENSBORO**

**John R. Barlow, II**  
Tuggle, Duggins &  
Meschan  
P.O. Drawer X  
Greensboro, NC 27402  
(910) 378-1431  
Admitted to NCSB: 1970  
Certified: 1987

**L. Worth Holleman, Jr.**  
Carruthers & Roth  
P.O. Box 540  
Greensboro, NC 27402  
(910) 379-8651  
Admitted to NCSB: 1974  
Certified: 1987

**Thomas E. Wagg, III**  
Carruthers & Roth  
P.O. Box 540  
Greensboro, NC 27402  
(910) 379-8651  
Admitted to NCSB: 1962  
Certified: 1987

### **GREENVILLE**

**E. Cordell Avery**  
James, Hite, Avery, Clark  
& Robinson  
P.O. Drawer 15  
Greenville, NC 27835  
(919) 758-4100  
Admitted to NCSB: 1976  
Certified: 1987

**Gary B. Davis**  
Mattox, Davis & Barnhill  
P.O. Drawer 686  
Greenville, NC 27835  
(919) 758-3430  
Admitted to NCSB: 1975  
Certified: 1991

### **HICKORY**

**Terry M. Taylor**  
Tate, Young, Morphis,  
Bach & Farthing  
P.O. Drawer 2428  
Hickory, NC 28603  
(704) 322-4663  
(704) 322-2023 (Fax)  
Admitted to NCSB: 1984  
Certified: 1993

### **HIGH POINT**

**Kim W. Gallimore**  
Wyatt, Early, Harris,  
Wheeler & Hauser, L.L.P.  
P.O. Drawer 2086  
High Point, NC  
27261-2086  
(910) 884-4444  
(910) 889-5232 (Fax)  
Admitted to NCSB: 1980  
Certified: 1991

### **JACKSONVILLE**

**Frank W. Erwin**  
Erwin & Paramore  
P.O. Box 7206  
Jacksonville, NC 28540  
(910) 346-9671  
Admitted to NCSB: 1977  
Certified: 1987

### **LEXINGTON**

**Wayne L. Michael**  
Hedrick, Harp & Michael  
P.O. Box 2095  
Lexington, NC  
27293-2095  
(704) 246-2365  
Admitted to NCSB: 1977  
Certified: 1989

### **MOYOCK**

**John J. Flora, III**  
P.O. Box 369  
Moyock, NC 27958  
(919) 435-6378  
Admitted to NCSB: 1979  
Certified: 1993

### **NAGS HEAD**

**Robert B. Hohhs, Jr.**  
Hornthal, Riley, Ellis &  
Maland  
P.O. Box 310  
Nags Head, NC  
27959-0310  
(919) 441-0871  
Admitted to NCSB: 1986  
Certified: 1992

### **OXFORD**

**James E. Cross, Jr.**  
Royster, Royster, Cross &  
Thorp

P.O. Box 1166  
Oxford, NC 27565-1166  
(919) 693-3131  
Admitted to NCSB: 1973  
Certified: 1989

**N. Kyle Hicks**  
Finch, Hopper & Hicks  
P.O. Box 247  
Oxford, NC 27565  
(919) 693-8161  
Admitted to NCSB: 1984  
Certified: 1993

### **PINEHURST**

**Lu Pendelton Hayes**  
Van Camp, West, Hayes  
& Meacham  
P.O. Box 1389  
Pinehurst, NC 28374  
(910) 295-2525  
Admitted to NCSB: 1984  
Certified: 1989

**Dewitt T. Scarborough, III**

Brown & Robbins  
P.O. Box 370  
Pinehurst, NC 28374  
(910) 295-2161  
Admitted to NCSB: 1976  
Certified: 1991

### **RALEIGH**

**J. Clark Brewer**  
Young, Moore, Henderson  
& Alvis  
P.O. Box 31627  
Raleigh, NC 27622  
(919) 782-6860  
(919) 782-6753 (Fax)  
Admitted to NCSB: 1967  
Certified: 1988

**Patricia S. Horne**  
Seay, Titchener & Horne  
P.O. Box 18807  
Raleigh, NC 27619  
(919) 876-4100  
Admitted to NCSB: 1982  
Certified: 1990

**Laura K. Howell**  
Smith, Debnam, Hibbert &  
Pahl  
P.O. Drawer 26268  
Raleigh, NC 27611  
(919) 250-2000  
Admitted to NCSB: 1982  
Certified: 1989

**James K. Pendergrass**  
Reynolds & Pendergrass  
316 West Edenton St.  
Raleigh, NC 27603  
(919) 832-4110  
Admitted to NCSB: 1987  
Certified: 1992

**William E. Rouse, Jr.**  
1042 Washington Street  
Raleigh, NC 27605  
(919) 834-7277  
(919) 833-3616 (Fax)  
Admitted to NCSB: 1956  
Certified: 1989

**Christopher M. Wyne**  
Monroe, Wyne & Lennon  
178 Mine Lake Ct.  
Raleigh, NC 27615  
(919) 848-8500  
(919) 870-1449  
Admitted to NCSB: 1975  
Certified: 1989

## ROCKY MOUNT

**Harold D. Colston**  
P.O. Box 8446  
Rocky Mount, NC 27804  
(919) 985-1701  
Admitted to NCSB: 1967  
Certified: 1989

## SOUTHERN PINES

**Robert S. Thompson**  
Pollock, Fullenwider,  
Patterson & Thompson  
P.O. Box 540  
Southern Pines, NC 28388  
(910) 692-7811  
Admitted to NCSB: 1983  
Certified: 1992

## WAYNESVILLE

**Leon M. Killian**  
Killian, Kersten, Patton &  
Ellis  
P.O. Drawer 1260  
Waynesville, NC  
28786-1260  
(704) 452-5801  
Admitted to NCSB: 1969  
Certified: 1989

## WILMINGTON

**Kenneth A. Shanklin**  
P.O. Box 1347  
Wilmington, NC  
28402-1347  
(910) 762-9400  
Admitted to NCSB: 1973  
Certified: 1991

## WILSON

**R. Woody Harrison, Jr.**  
Narron, Holdford, Babb,  
Harrison & Rhodes  
P.O. Box 279  
Wilson, NC 27893-0279  
(919) 237-3153  
Admitted to NCSB: 1967  
Certified: 1987

## WINSTON-SALEM

**Alfred G. Adams**  
Petree, Stockton, L.L.P.  
1001 West Fourth Street  
Winston-Salem, NC  
27101  
(910) 607-7448  
Admitted to NCSB: 1973  
Certified: 1987

**Robert H. Sapp**  
Sapp, Mast & Stroud  
120 W. Third St.  
Winston-Salem, NC  
27101-3902  
(910) 722-7158  
Admitted to NCSB: 1957  
Certified: 1989

**Philip E. Searcy**  
Craig, Brawley, Liipfert  
& Ross  
P.O. Box 1666  
Winston-Salem, NC  
27102-1666  
(910) 725-0583  
Admitted to NCSB: 1981  
Certified: 1993

**Donald M. VonCannon**  
Allman, Spry, Humphreys,  
Leggett & Howington  
P.O. Drawer 5129  
Winston-Salem, NC  
27113-5129  
(910) 722-2300  
Admitted to NCSB: 1971  
Certified: 1988

## Family Law

### ASHEVILLE

**Michael W. Drye**  
Brock, Drye & Aceto  
501 College St.  
Asheville, NC 28801  
(704) 258-1384  
Admitted to NCSB: 1976  
Certified: 1993

**Ingrid K. Friesen**  
Suite 1510, BB&T  
Building  
One West Park Square  
Asheville, NC 28801  
(704) 254-0565  
Admitted to NCSB: 1984  
Certified: 1993

**Howard L. Gum**  
Gum & Hillier  
P.O. Box 7115  
Asheville, NC 28802  
(704) 258-3368  
Admitted to NCSB: 1976  
Certified: 1989

**James J. Hugenschmidt**  
Whalen, Hay, Pitts,  
Hugenschmidt, Master,  
Devereux & Belser  
P.O. Box 2868  
Asheville, NC 28802-2868  
(704) 255-8085  
Admitted to NCSB: 1973  
Certified: 1989

**Robert E. Riddle**  
P.O. Box 7206  
Asheville, NC 28802  
(704) 258-2394  
Admitted to NCSB: 1959  
Certified: 1990

## BURLINGTON

**James W. Harrison**  
Wishart, Norris,  
Henninger & Pittman  
P.O. Box 1998  
Burlington, NC  
27216-1998  
(910) 584-3388  
Admitted to NCSB: 1985  
Certified: 1992

## CARY

**Michael F. Schilawski**  
Brady, Schilawski, Earls  
& Ingram  
102-A Commonwealth Ct.  
Cary, NC 27511  
(919) 467-4242  
Admitted to NCSB: 1982  
Certified: 1989

## CHAPEL HILL

**Donna A. Davis**  
Levine, Steward & Davis  
143 W. Franklin St.  
Suite 202  
Chapel Hill, NC 27516  
(919) 929-0386  
Admitted to NCSB: 1988  
Certified: 1993

**Margaret D. Rundell**  
P.O. Box 1194  
Chapel Hill, NC 27514  
(919) 967-3074  
Admitted to NCSB: 1979  
Certified: 1991

## CHARLOTTE

**A. Marshall Basinger, II**  
Cameron Brown Bldg.  
Suite 809  
301 S. McDowell St.  
Charlotte, NC 28204  
(704) 377-2984  
Admitted to NCSB: 1965  
Certified: 1991

**L. Stanley Brown**  
1308 East Fourth St.  
Charlotte, NC 28204

(704) 377-9714  
Admitted to NCSB: 1970  
Certified: 1992

**Thomas R. Cannon**  
Helms, Cannon, Hamel &  
Henderson  
Two First Union Ctr.  
Suite 2300  
Charlotte, NC 28282  
(704) 372-4884  
Admitted to NCSB: 1965  
Certified: 1989

**Robert P. Hanner, II**  
Casstevens, Hanner,  
Gunter & Gordon  
P.O. Box 34607  
Charlotte, NC 28234  
(704) 372-2140  
Admitted to NCSB: 1969  
Certified: 1989

**Fred A. Hicks**  
Hicks, Hodge & Cranford  
1308 E. Fourth St.  
Charlotte, NC 28204  
(704) 377-9714  
Admitted to NCSB: 1968  
Certified: 1989

**Grace E. Hodges**  
First Citizens Bank Plaza  
128 S. Tryon St.  
Suite 830  
Charlotte, NC 28202-5001  
(704) 334-2200  
Admitted to NCSB: 1979  
Certified: 1989

**David M. Kern**  
James, McElroy & Diehl  
600 S. College St.  
Charlotte, NC 28202  
(704) 372-9870  
Admitted to NCSB: 1978  
Certified: 1990

**Alan R. Krusch**  
Wishart, Norris,  
Henninger & Pittman  
6832 Morrison Boulevard  
Charlotte, NC 28211  
(704) 364-0010  
Admitted to NCSB: 1977  
Certified: 1990

**Cynthia P. Leone**  
P.O. Box 34546  
Charlotte, NC 28234-4546  
(704) 332-5297  
Admitted to NCSB: 1980  
Certified: 1989

**Tate K. Sterrett**  
Horack, Talley, Pharr &  
Lowndes, P.A.  
2600 One First Union Ctr.  
301 S. College St.  
Charlotte, NC 28202-6038  
(704) 377-2500  
(704) 372-2619 (Fax)

Admitted to NCSB: 1973  
Certified: 1992

**Terri L. Young**  
Hicks, Brown & Mann,  
P.A.  
1308 East Fourth Street  
Suite 100  
Charlotte, NC 28204  
(704) 377-9714  
(704) 372-2723 (Fax)  
Admitted to NCSB: 1988  
Certified: 1994

## DURHAM

**Nancy J. Foil**  
P.O. Box 3368  
Durham, NC 27702  
(919) 688-9631  
Admitted to NCSB: 1976  
Certified: 1992

**Nancy E. Gordon**  
3308 Chapel Hill Blvd.  
Suite 160  
Durham, NC 27707  
(919) 683-1002  
Admitted to NCSB: 1982  
Certified: 1991

**Martha N. Milam**  
Poe, Hoof & Reinhardt  
401 N. Mangum Street  
Durham, NC 27701  
(919) 687-4050  
(919) 683-2391 (Fax)  
Admitted to NCSB: 1987  
Certified: 1995

## FAYETTEVILLE

**Renny W. Deese**  
Reid, Lewis, Deese &  
Nance  
P.O. Drawer 1358  
Fayetteville, NC 28302  
(910) 483-0454  
Admitted to NCSB: 1971  
Certified: 1989

**Joan E. Hedahl**  
Hedahl & Radtke  
1015 Arsenal Ave.  
Fayetteville, NC 28305  
(910) 323-5430  
Admitted to NCSB: 1981  
Certified: 1993

**Debra J. Radtke**  
Hedahl & Radtke  
1015 Arsenal Ave.  
Fayetteville, NC 28305  
(910) 323-5430  
Admitted to NCSB: 1981  
Certified: 1993

## GASTONIA

**Lloyd T. Kelso**  
Kelso & Ferguson  
P.O. Box 333

Gastonia, NC 28053-0333  
(704) 864-9754  
Admitted to NCSB: 1977  
Certified: 1989

## **GOLDSBORO**

**Stephen R. Warren**  
P.O. Box 10507  
Goldsboro, NC  
27532-0507  
(919) 778-3877  
Admitted to NCSB: 1982  
Certified: 1989

## **GRAHAM**

**William L. Livesay**  
P.O. Box 860  
Graham, NC 27253  
(910) 226-1681  
Admitted to NCSB: 1979  
Certified: 1990

## **GREENSBORO**

**Martin D. Berry**  
Gabriel, Berry & Weston  
214 Commerce Place  
Greensboro, NC 27401  
(910) 275-9381  
Admitted to NCSB: 1975  
Certified: 1989

**Gerard M. Chapman**  
Stern, Graham & Klepfer,  
L.L.P.  
P.O. Box 3112  
Greensboro, NC 27402  
(910) 373-1500  
(910) 272-8258 (Fax)  
Admitted to NCSB: 1980  
Certified: 1994

**Trudy A. Ennis**  
Adams, Kleemeier, Hagan,  
Hannah & Fouts  
301 N. Elm Street, Suite  
500  
Greensboro, NC 27401  
(910) 373-1600  
(910) 273-5357 (Fax)  
Admitted to NCSB: 1987  
Certified: 1994

**Kathryn K. Hatfield**  
Hatfield & Hatfield  
219 W. Washington St.  
Greensboro, NC 27401  
(910) 273-0589  
Admitted to NCSB: 1974  
Certified: 1989

**William W. Jordan**  
Nichols, Caffrey, Hill,  
Evans & Murrelle  
P.O. Box 989  
Greensboro, NC 27402  
(910) 379-1390  
Admitted to NCSB: 1970  
Certified: 1993

**Barbara R. Morgenstern**  
419 North Edgeworth St.  
Suite 100  
Greensboro, NC 27401  
(910) 379-5006  
Admitted to NCSB: 1986  
Certified: 1991

**Carolyn J. Woodruff**  
Tuggle, Duggins &  
Meschan  
P.O. Drawer X  
Greensboro, NC 27402  
(910) 378-1431  
Admitted to NCSB: 1983  
Certified: 1989

## **GREENVILLE**

**Dallas C. Clark, Jr.**  
P.O. Box 7245  
Greenville, NC 27834  
(919) 752-5883  
Admitted to NCSB: 1968  
Certified: 1993

**Nelson B. Crisp**  
Blount & Crisp  
P.O. Box 7146  
Greenville, NC 27858  
(919) 752-6161  
Admitted to NCSB: 1968  
Certified: 1993

**Edward P. Hausle**  
306 Maple Ridge Road  
Greenville, NC 27858  
(919) 758-6926  
Admitted to NCSB: 1985  
Certified: 1990

## **HIGH POINT**

**A. Doyle Early, Jr.**  
Wyatt, Early, Harris,  
Wheeler & Hauser, L.L.P.  
P.O. Drawer 2086  
High Point, NC  
27261-2086  
(910) 884-4444  
(910) 889-5232 (Fax)  
Admitted to NCSB: 1967  
Certified: 1990

## **JACKSONVILLE**

**John T. Carter, Jr.**  
Warlick, Milsted, Dotson  
& Carter  
P.O. Drawer 766  
Jacksonville, NC 28541  
(910) 455-1215  
Admitted to NCSB: 1976  
Certified: 1991

**Lana S. Warlick**  
P.O. Box 1393  
Jacksonville, NC 28541  
(910) 347-4400  
Admitted to NCSB: 1976  
Certified: 1989

## **KILL DEVIL HILLS**

**Sidney P. Jessup**  
Aldridge, Seawell &  
Khoury  
P.O. Box 1584  
Kill Devil Hills, NC 27948  
(919) 441-4141  
Admitted to NCSB: 1986  
Certified: 1993

## **LINCOLNTON**

**Johnathan L. Rhyne, Jr.**  
Jonas, Jonas & Rhyne  
P.O. Box 38  
Lincolnton, NC 28092  
(704) 735-1423  
(704) 735-1490 (Fax)  
Admitted to NCSB: 1981  
Certified: 1994

## **NEW BERN**

**Charles W. Kafer**  
Kafer & Hunter  
P.O. Box 947  
New Bern, NC 28560  
(919) 636-3788  
Admitted to NCSB: 1969  
Certified: 1989

## **RALEIGH**

**Jennifer M. Green**  
Johnson, Mercer, Hearn &  
Vinegar, P.L.L.C.  
P.O. Box 1776  
Raleigh, NC 27602  
(919) 832-8396  
(919) 821-2049  
Admitted to NCSB: 1988  
Certified: 1994

**E. Parker Herring**  
Johnson, Mercer, Hearn &  
Vinegar, P.L.L.C.  
P.O. Box 1776  
(919) 832-8396  
(919) 821-2049 (Fax)  
Admitted to NCSB: 1986  
Certified: 1994

**Catherine C. McLamb**  
Howard, From, Stallings  
& Hutson  
4000 WestChase Blvd.  
Suite 400  
Raleigh, NC 27607  
(919) 833-2983  
Admitted to NCSB: 1975  
Certified: 1993

**Len C. Mueller**  
DeMent, Askew,  
Gammon, Mueller &  
DeMent  
P.O. Box 711  
Raleigh, NC 27602  
(919) 833-5555  
(919) 833-8287 (Fax)

Admitted to NCSB: 1985  
Certified: 1994

**John W. Narron**  
Smith, Debnam, Hibbert &  
Pahl  
P.O. Drawer 26268  
Raleigh, NC 27611  
(919) 250-2000  
Admitted to NCSB: 1977  
Certified: 1989

**Robert A. Ponton, Jr.**  
Wyrick, Robbins, Yates &  
Ponton  
4101 Lake Boone Trail  
Suite 300  
Raleigh, NC 27607  
(919) 781-4000  
Admitted to NCSB: 1979  
Certified: 1993

**Carlyn G. Poole**  
Tharrington, Smith &  
Hargrove  
P.O. Box 1151  
Raleigh, NC 27602  
(919) 821-4700  
Admitted to NCSB: 1979  
Certified: 1993

**Lee S. Rosen**  
Rosen & Robbins  
4101 Lake Boone Trail  
Suite 305  
Raleigh, NC 27607  
(919) 787-6668  
Admitted to NCSB: 1987  
Certified: 1992

**Anne B. Salisbury**  
P.O. Box 351  
Raleigh, NC 27602  
(919) 755-4101  
Admitted to NCSB: 1982  
Certified: 1989

**Marc W. Sokol**  
Ragsdale, Kirschbaum,  
Nanney & Sokol  
300 West Millbrook Rd.  
Raleigh, NC 27609  
(919) 848-0420  
Admitted to NCSB: 1982  
Certified: 1992

**Rose H. Stout**  
Smith, Debnam, Hibbert &  
Pahl  
4700 New Bern Ave.  
Raleigh, NC 27611  
(919) 250-2169  
Admitted to NCSB: 1985  
Certified: 1991

**Mark E. Sullivan**  
1306 Hillsborough St.  
Raleigh, NC 27605  
(919) 832-8507  
Admitted to NCSB: 1976  
Certified: 1989

## **ROCKY MOUNT**

**Robert L. Fuerst**  
Henson & Fuerst  
P.O. Box 7008  
Rocky Mount, NC 27804  
(919) 443-2111  
Admitted to NCSB: 1973  
Certified: 1989

**J. Edgar Moore**  
Moore, Diedrick, Carlisle  
& Hester  
P.O. Box 2626  
Rocky Mount, NC  
27802-2626  
(919) 977-1911  
Admitted to NCSB: 1963  
Certified: 1992

## **SALISBURY**

**Robert L. Inge**  
111 West Council Street  
Salisbury, NC 28144-4320  
(704) 633-8486  
Admitted to NCSB: 1987  
Certified: 1993

## **STATESVILLE**

**Pamela H. Simon**  
Pope, McMillan, Gourley,  
Kutteh & Simon, P.A.  
P.O. Drawer 1776  
Statesville, NC 28677  
(704) 873-2131  
(704) 872-7629 (Fax)  
Admitted to NCSB: 1984  
Certified: 1993

## **SMITHFIELD**

**Marcia H. Armstrong**  
Armstrong & Armstrong  
P.O. Box 27  
Smithfield, NC 27577  
(919) 934-1575  
Admitted to NCSB: 1983  
Certified: 1989

**Stephen C. Woodard, Jr.**  
Daughtry, Woodard,  
Lawrence & Starling  
P.O. Drawer 1960  
Smithfield, NC  
27577-1960  
(919) 934-5012  
Admitted to NCSB: 1976  
Certified: 1989

## **WASHINGTON**

**Debra H. Gaskins**  
Gaskins & Gaskins  
P.O. Box 933  
Washington, NC 27889  
(919) 975-2602  
Admitted to NCSB: 1980  
Certified: 1993

## WILKESBORO

**George G. Cunningham**  
Ferree, Cunningham &  
Gray  
One Court Square  
Wilkesboro, NC 28697  
(910) 838-7500  
Admitted to NCSB: 1975  
Certified: 1989

## WILMINGTON

**James W. Lea, III**  
Shipman & Lea  
11 S. 5th Street  
Wilmington, NC 28401  
(910) 762-1990  
Admitted to NCSB: 1980  
Certified: 1993

## WINSTON-SALEM

**Christopher L. Beal**  
Metcalf, Vrsecky & Beal  
380 Knollwood St.  
Suite 450  
Winston-Salem, NC 27103  
(910) 777-0067  
Admitted to NCSB: 1982  
Certified: 1990

**Lynn P. Burleson**  
Petree & Stockton  
1001 W. Fourth St.  
Winston-Salem, NC 27101  
(910) 725-2351  
Admitted to NCSB: 1980  
Certified: 1991

**Fred G. Crumpler**  
White & Crumpler  
11 W. Fourth St.  
Winston-Salem, NC 27101  
(910) 725-1304  
Admitted to NCSB: 1957  
Certified: 1989

**Joslin Davis**  
Davis & Harwell  
1144 W. Fourth St.  
Winston-Salem, NC  
27101-2402  
(910) 722-1534  
Admitted to NCSB: 1977  
Certified: 1989

**Joseph J. Gatto**  
2000 West First St.  
Suite 400  
Winston-Salem, NC 27104  
(910) 722-7100  
Admitted to NCSB: 1979  
Certified: 1989

**Clifton R. Long, Jr.**  
Morrow, Alexander, Tash  
& Long  
P.O. Box 25226  
Winston-Salem, NC  
27114-5226  
(910) 760-1400

Admitted to NCSB: 1982  
Certified: 1992

**John F. Morrow**  
Morrow, Alexander, Tash  
& Long  
P.O. Box 25226  
Winston-Salem, NC 27103  
(910) 760-1400  
Admitted to NCSB: 1965  
Certified: 1989

**George E. Parker**  
White & Crumpler  
11 W. Fourth St.  
Winston-Salem, NC 27101  
(910) 725-1304  
Admitted to NCSB: 1971  
Certified: 1989

**Dean B. Rutledge**  
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Admitted to NCSB: 1982  
Certified: 1990

**Meyressa H. Schoonmaker**  
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(910) 722-1143 (Fax)  
Admitted to NCSB: 1968  
Certified: 1989

**Robin J. Stinson**  
Davis & Harwell, P.A.  
1144 W. Fourth St.  
Winston-Salem, NC 27101  
(910) 722-1534  
(910) 722-2382 (Fax)  
Admitted to NCSB: 1984  
Certified: 1991

**Gary B. Tash**  
Morrow, Alexander, Tash  
& Long  
P.O. Box 25226  
Winston-Salem, NC 27103  
(910) 760-1400  
Admitted to NCSB: 1971  
Certified: 1989

## YADKINVILLE

**Nelson L. Hudspeth, III**  
Shore, Hudspeth &  
Harding  
P.O. Box 936  
Yadkinville, NC 27055  
(919) 679-2076  
Admitted NCSB: 1976  
Certified: 1989

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To be certified a lawyer must 1) show substantial involvement in the practice of law in the specialty field during the preceding 5 years, 2) attain a specified number of hours of accredited continuing legal education in the specialty field, 3) secure satisfactory references or recommendations regarding the lawyer's competence and qualifications in the specialty field, and 4) pass a written examination designed to test the lawyer's knowledge and ability in the specialty field.

FOR MORE INFORMATION, call or write Director, N.C. State Bar Board of Legal Specialization, P.O. Box 25908, Raleigh, NC 27611, (919) 828-4620, ext. 249.

# State Bar Committees and District Bar Officers

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# 1994-1995 North Carolina State Bar Committee List

## Regular Business

### Executive Committee:

Considers all special business, and recommends action to the Council.

Charles M. Davis, Chairperson  
Fred H. Moody, President-Elect  
W. Erwin Spainhour, Vice-President  
Robert J. Robinson, Past-President  
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Howard P. Satsky  
Ann Reed  
Cressie H. Thigpen, Jr.  
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Joseph G. Maddrey  
Robert C. Sink  
William O. King  
William R. Hoyle  
Stephen E. Culbreth  
Linwood B. Hollowell, Jr.  
Public Member:  
Hermon F. Fox  
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Robert A. Wicker, Past-President  
John H. Vernon, III, Past-President  
Tommy W. Jarrett, Past-President  
Emil F. Kratt, Past-President  
Robert G. Baynes, Past-President  
L. Thomas Lunsford, II, Staff Advisor

### Grievance Committee:

The grand jury of the lawyer discipline system.

William O. King, Chairperson  
Ann Reed, Vice-Chairperson  
Stephen E. Culbreth, 1st Vice-Chairperson  
William A. Powell, 2nd Vice-Chairperson  
William R. Hoyle, 3rd Vice-Chairperson  
Linwood B. Hollowell, Jr., 4th Vice-Chairperson  
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Robert A. Evans  
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T. Paul Messick, Jr.  
Joseph G. Maddrey  
Gary W. Thomas  
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H. Gerald Beaver  
John R. Parker, Jr.  
N. Dixon Lackey, Jr.  
Richard V. Bennett

Walter W. Baker, Jr.  
John M. May  
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Francis M. Pinckney  
Jonathan L. Megerian  
Robert F. Siler  
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Jewel Cooper  
Carolyn Bakewell, Staff Advisor  
*Ex Officio:*  
Charles M. Davis, President  
Fred H. Moody, Jr., President-Elect  
W. Erwin Spainhour, Vice-President  
Robert J. Robinson, Past-President

### Consumer Protection Committee:

Reviews complaints of unauthorized practice; issues preliminary correspondence as well as "cease and desist" orders, and offers advisory opinions.

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Howard C. Colvard, Jr.  
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Jill B. Hickey  
Cindy G. Oliver  
A. Root Edmonson, Staff Advisor  
Harriet Tharrington, Staff Advisor

### Ethics Committee:

Issues ethics opinions and decisions in response to inquiries by lawyers and others; reviews ethics advisories issued by the executive director of the staff.

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Robert F. Baker, Vice-Chairperson  
James P. Erwin, Jr.  
E. Fitzgerald Parnell  
William H. Jones, Jr.

Howard E. Manning, Sr.  
H. Dockery Teele, Jr.  
John L. Holshouser, Jr.  
Mark W. Owens, Jr.  
Samuel M. Millette  
James M. Kimzey  
Julius E. Banzet, II  
Dudley Humphrey  
Richard L. Magee  
Adam Stein  
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Sharon Parker  
Michael Wells  
Samuel Woodley, Jr.  
David Logan  
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Reviews the status of all active lawyers.

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Calvin E. Murphy  
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### Legal Aid to Indigents Committee:

Considers relevant subjects concerning the delivery of legal services to indigents, especially regarding criminal matters.

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### Publications Committee:

Supervises the publication of the State Bar Newsletter and of the Quarterly.

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Hears any grievance appealed to it  
 by a staff employee.

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#### **Retirement Committee:**

Reviews any proposed changes in  
 the staff employees' qualified  
 pension plan.

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 Fred H. Moody, Jr.,  
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 Robert J. Robinson, Past-President  
 L. Thomas Lunsford, II, Staff  
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#### **Appointments Committee:**

Recommends to the Council  
 persons to be appointed to the  
 State Bar's boards and agencies;  
 discusses the activities of the  
 boards and agencies.



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## **Survey Coverage**

for the lender without a new survey is a hot topic in the title insurance business these days. This concept is not new.

What IS new is the fact that some title companies are giving survey coverage to the lenders without any survey at all—new or old—and giving the owner/borrower no coverage.

Is this what you want for your real estate clients? Are you prepared to answer their questions when their driveway turns out to be located on their neighbor's property and you let them close without a survey?

The North Carolina Department of Insurance made the following statement in a letter dated December 17, 1992: "This Department continues to believe that sound underwriting practices require that a survey be conducted when survey coverage is being provided."

Have you thought about these things? We have. Call us and let's talk. We've been competitive for the last thirty years, and we intend to keep on meeting the demands of the marketplace and still use sound underwriting practices.

**Fidelity National Title**  
**1-800-662-7729**

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**The North Carolina State Bar wishes  
 to thank the Michie Company for  
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 January 12, 1995.**

**We greatly appreciate their  
 contributions.**

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The Board of Trustees for the staff employees' qualified pension plan.

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Composed of the six most recent past-presidents, annually nominates a candidate for president-elect, vice-president, and secretary-treasurer.

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#### **Civil Access to Justice Committee:**

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Considers applications for the organization of professional corporations and limited liability companies.

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Considers relevant subjects involving legal assistance; maintains written guidelines for lawyers in their use of legal assistants.

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Implements the Council's request for changes in laws affecting the State Bar.

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A liaison group with lawyers serving military personnel in North Carolina.

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#### **Professionalism Committee:**

Developing programs to enhance professionalism, including commitment to ethics, the legal system, and public service. Considering means to assist new lawyers to enter the profession with competence in practice skills.

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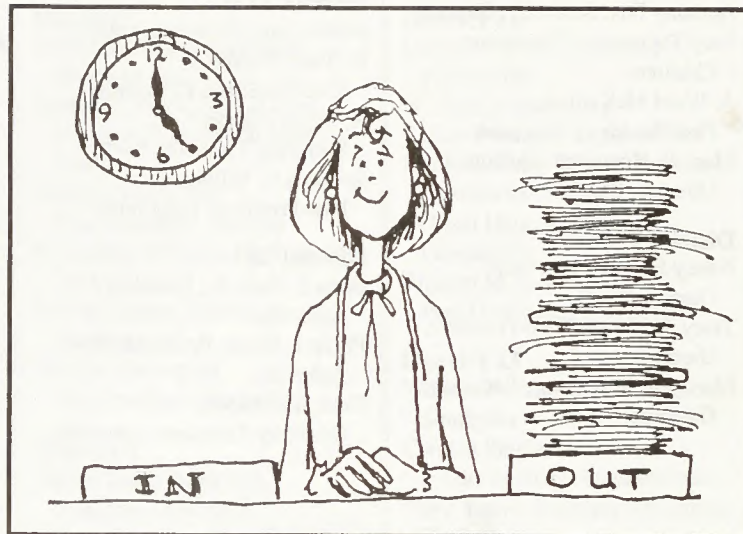
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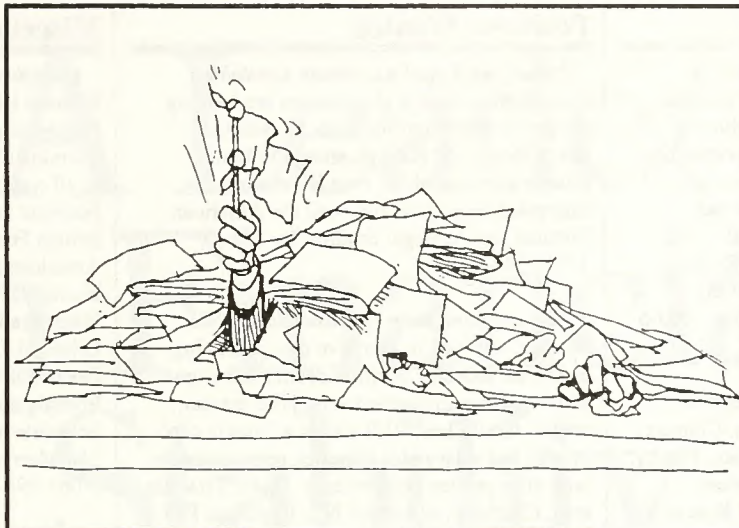
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LMAP provides confidential management resource services to attorneys and legal support staff including educational programs and materials, office audits and consultations. The program is designed for all North Carolina attorneys. In addition to private practitioners, LMAP participants include attorneys in many other fields (i.e., government, corporate, medical).

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LMAP offers in-house visits and a wide variety of services including:

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- C. Hourly consultations, reports, research and miscellaneous projects—\$75/hour
- D. LMAP resource manual of articles, checklists & forms: *Maximizing Quality & Minimizing Risks*—\$45 (plus tax)
- E. Management self audits—\$5 each or \$35 per set (plus tax)

### Scheduling Office Visits & Other LMAP Services

For additional information or to schedule LMAP services for your office, please contact:

Nancy Byerly Jones, Director & Management Counsel, LMAP

Post Office Box 3097, Chapel Hill, NC 27515-3097

Telephone and/or Facsimile: (919) 968-6068; or

Ruby T. Edwards, Administrative Assistant, LMAP

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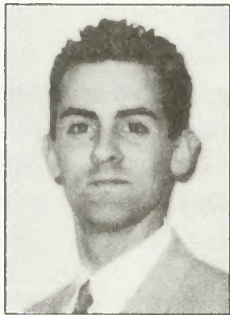
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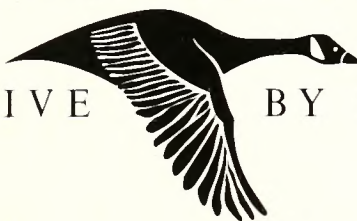
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